UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. SDI FUTURE HEALTH, INC., TODD STUART KAPLAN, and JACK BRUNK, Defendants.	Case No. 2:05-cr-00078-PMP-GWF **FINDINGS AND RECOMMENDATIONS**

This matter is before the Court on Defendants' Motion to Suppress Evidence From the Illegal Search of SDI Pursuant to Invalid General Warrant (#41), filed on December 2, 2005; the Government's Opposition to Defendants' Motion To Suppress (#58), filed on January 31, 2006; and Defendants' Reply (#69), filed on March 15, 2006. The Court held an evidentiary hearing in this matter on April 27 and 28, 2006.

The principal contention of Defendants' Motion to Suppress is that the search warrant for the premises of Defendant SDI Future Health, Inc. ("SDI") violated the Fourth Amendment because it did not "particularly describe the things to be seized" and therefore constituted an impermissible "general warrant." Accordingly, Defendants argue that all evidence resulting from the illegal seizure of documents from SDI should be suppressed as the "fruits of the poisonous tree." Defendants also argue that signed consents obtained from its corporate officers to search an offsite storage facility were tainted by the illegality of the search warrant and are therefore invalid. Defendants additionally contend that the written consents were executed under duress and were not freely and voluntarily given.

Accordingly, Defendants also argue that all evidence seized from the storage facility should be suppressed.[1]

The Government argues that because of the complex nature of the health care insurance fraud and tax evasion investigation, the search warrant's description of items to be seized was reasonably specific and complied with the Fourth Amendment. The Government also argues that the warrant was valid under the exception to the particularity requirement for a business or enterprise that is permeated with fraud. The Government also argues that even if the search warrant violated the Fourth Amendment, the Government's agents acted in good faith reliance on the validity of the search warrant and, therefore, the evidence seized pursuant to the warrant should not be suppressed. The Government argues that the consents to search the offsite storage facility obtained from SDI's officers Todd Kaplan and Robert Kaplan were knowingly and voluntarily made. The Government also challenges the standing of Defendants Todd Kaplan and Jack Brunk to contest the constitutionality of the search and seizure of SDI's business records.

At the evidentiary hearing, the Government presented the testimony of Julie Bomstad, formerly Julie Raftery, a special agent of the Internal Revenue Service/Criminal Investigation, whose affidavit was submitted in support of the search warrant application and who was one of the supervising agents who conducted the search pursuant to the warrant. Defendants presented testimony by Robert Kaplan, an officer and employee of SDI, regarding the manner in which the search was executed and the circumstances regarding his written consent to search an offsite storage facility where SDI records were housed. Defendant Jack Brunk also testified regarding SDI's and its officers' alleged expectation of privacy in SDI's premises and records and the manner in which the search warrant was executed. As rebuttal evidence, the Government introduced videotapes which depicted the SDI offices and the offsite storage facility on January 31, 2002 before and after the Government's agents seized documents and computer records pursuant to the search warrant.

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[1]Defendants have also filed a Motion for a *Franks* Hearing (#42) in which they allege that the Government intentionally misrepresented or recklessly omitted material facts from the affidavit, which, if properly stated, would have rendered the agent's affidavit insufficient to support a finding of probable cause by the magistrate judge.

FACTS

On January 28, 2002, the Government applied to United States Magistrate Judge Stephen J. Hillman in the Central District of California for the issuance of a warrant to search the business premises of Defendant SDI located in Westlake Village, California. The application for the search warrant was based on a 34 page affidavit prepared by Julie Raftery, now Bomstad,[2] a special agent of the Internal Revenue Service/Criminal Investigation which sought to seize SDI's business records described in the affidavit and in Attachment "B" to the search warrant. The Government also sought to seize the state and federal income tax returns and any information relating to the preparation of those returns for Todd Kaplan and Denise Kaplan, and SDI.

Pursuant to a stipulation by the parties during the evidentiary hearing, it was agreed that at the time of the application for the search warrant, Defendant Todd Kaplan was the president of SDI and owned 48 percent of its stock. Defendant Jack Brunk was a vice-president of SDI in charge of clinical services and owned 11 percent of SDI's stock. The other remaining 41 percent of SDI's stock was owned by other SDI officers, employees or outside investors.

1. Allegations in Affidavit Supporting Issuance of the Search Warrant.

Agent Bomstad testified that her affidavit was prepared after months of investigation by Nevada and Federal law enforcement agencies into the suspected fraudulent insurance billings of SDI and tax fraud or tax evasion allegedly committed by Todd Kaplan and SDI. According to Agent Bomstad, the affidavit was prepared over several weeks time and was reviewed by fellow case agents and supervisory personnel, including district counsel of the IRS Las Vegas Field Office, the supervisory special agents of the IRS and FBI, the IRS Special Agent in charge of the Las Vegas Office, and the Assistant United States Attorney for the District of Nevada, Steven Myhre.

A. Health Care Fraud Allegations.

Agent Bomstad's affidavit alleged that SDI and its principal officer, Todd Kaplan, engaged in a conspiracy with physicians and certain entities referred to as "cardiac diagnostic companies (CDCs)" to

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[2]For simplicity and clarity Agent Bomstad will be referred to herein by her present last name rather than her former last name of Raftery.

fraudulently bill Medicare and private health insurers for unnecessary sleep studies and fraudulent cardiac risk assessment studies that were allegedly performed in conjunction with the sleep studies. The affidavit alleged that the information gathered during the Government's investigation provided probable cause to believe that SDI and Todd Kaplan had engaged in mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and health care fraud in violation of 18 U.S.C. § 1347. The alleged fraudulent conspiracy as described in the affidavit was as follows:

Through agreements with referring physicians, SDI placed its own employees, known as health service coordinators, in the referring physicians' offices. These SDI employees met with the physicians' patients and had them fill out questionnaires regarding sleep problems. Based on the patients' questionnaire responses, the SDI employee completed a physician referral for a sleep study to be performed by SDI. The physician signed the referral which the SDI employee then faxed to SDI corporate headquarters to schedule a sleep study. According to the affidavit, many of the patients referred to SDI for sleep studies did not need them. SDI would arrange for the sleep studies to be performed in sleep labs, in hotel rooms or in the patients' homes. The SDI sleep studies were performed by attaching the patient to electrocardiographic monitoring equipment, commonly called a 24 Hour Holter Monitor, which was connected to an SDI "lap-top" computer. This equipment would then monitor various parameters of sleep and cardiac responses to sleep. The sleep study would generally last 6-8 hours.

The computer data would then be analyzed by a non-physician SDI employee who prepared a sleep study report. Although SDI allegedly employed staff physicians who reviewed the sleep study data and drafted and signed the sleep study reports, the affidavit alleged that these staff physicians, in fact, did not actually draft, review, approve or sign the reports. Instead, SDI affixed the staff physicians' signatures to the reports with signature stamps. The affidavit alleges that the SDI sleep studies were of poor quality. The affidavit also alleged that SDI frequently and improperly scheduled patients for a second sleep study and CPAP titration before the results of the first sleep study were known. SDI's decision to schedule a second sleep study was based on whether the patient's insurer would pay for a second study rather than on whether it was medically reasonable or necessary.

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As part of the alleged fraudulent scheme, the affidavit alleged that SDI sent the 24 Hour Holter Monitor data to the cardiac diagnostic companies (CDCs) which would analyze the data and prepare cardiac risk assessment studies for the referring physicians. These tests or studies included a Heart Rate Variability (HRV) test, 24-hour electrocardiogram (ECG) test and a Signal Average Electrocardiogram (SAECG) test. The cardiac diagnostic companies (CDCs) would separately bill Medicare or the patient's private health insurer for performing these tests. The affidavit alleged that these cardiac risk assessment studies were not actually performed for the required 24 hour monitoring period billed by the cardiac diagnostic companies because the sleep studies only lasted 6-8 hours; the tests were not conducted under proper conditions to test a patient's cardiac responses; and that a sleep study, which included its own cardiac component, was not a legitimate medical reason for performing such tests.

Agent Bomstad's affidavit alleged that physicians were induced to accept SDI employees into their offices and participate in the fraudulent sleep study referral scheme through SDI's "revenue enhancement program." Under this program, SDI allegedly advised the physicians that they could earn additional revenue by billing Medicare and private insurers for the professional component – physician review and interpretation – of the cardiac risk assessment tests performed by the cardiac diagnostic companies (CDC's). SDI also allegedly advised the physicians that they could earn additional revenue by billing for follow-up appointments with the patients to review the cardiac risk assessments and sleep study reports. The affidavit also alleged that there was a "kick-back" scheme between SDI and the cardiac diagnostic companies (CDC's). One of the cardiac diagnostic companies, Cardiac Monitoring Services (CMS) paid SDI over $1,572,000 from June 2000 through April 2001. Another cardiac diagnostic company with whom SDI later did business, Comprehensive Cardiac Care, was incorporated in 2000. SDI's president Todd Kaplan was also president of Comprehensive Cardiac Care and its "registered office" address was the same as SDI's corporate headquarters in Westlake Village, California.

The affidavit described the information provided by the individuals whom the Government interviewed during its investigation, the Government's review of insurance claims records regarding SDI's and the cardiac diagnostic companies' billings, and the opinions provided by the Government's medical consultants regarding the illegitimacy of the cardiac risk assessment studies and the billing

practices of SDI and the cardiac diagnostic companies.

The affidavit listed three former SDI employees who provided information which the Government relied on in support of its affidavit. Randy Lollar, a former SDI sales manager, provided the Government with information regarding SDI's "revenue enhancement program" with the referring physicians. Erin Beglinger, a registered polysomnographer, who was responsible for training and supervising SDI's sleep study technicians, advised the Government that many of the patients did not need sleep studies[3], that SDI's sleep studies were of poor quality, that she had not been permitted to meet with the staff physicians who allegedly signed the sleep study reports, and that she was told by other SDI employees that none of them had seen the physicians who allegedly interpreted the sleep studies and wrote the reports. Ms. Beglinger also allegedly told the Government that Defendant Jack Brunk told her that the sleep study reports were actually written by a 17 year old high school girl.

John Gardner, a former vice-president and Chief Operating Officer of SDI, allegedly told the Government that there was ongoing concern at SDI about billing for the 24 Hour Holter Monitor. Mr. Gardner also stated that Defendant Jack Brunk informed him that Dr. Awerbuch, one of SDI's staff doctors whose name appeared on many of the sleep study reports, trained him to write the reports and that Brunk then placed the physician's signature on the reports with a signature stamp.

The affidavit also named two other persons who owned companies that did business with SDI and provided information relevant to the allegations in the affidavit: Darlene Steljes and Christine Gibaud. Ms. Steljes was the owner of Sleep Clinic of Nevada, a certified sleep lab. According to the affidavit, Ms. Steljes entered into a limited liability company with Todd Kaplan in 1998-1999, but terminated the business relationship when SDI's business practices became of concern to her. Ms. Gibaud was a former owner of Sleep Consultants, located in Saginaw, Michigan. In 1998 Ms. Gibaud entered into an LLC to form SDI Future Health of Michigan. In 1999 Kaplan "successfully took total control of SDI of Michigan." Ms. Steljes and Ms. Gibaud also allegedly informed the Government that

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[3]As exhibits to their *Motion for a Franks Hearing (#42)*, Defendants attached copies of the Government notes regarding its interviews with Ms. Beglinger. According to those notes, Ms. Beglinger advised the Government that approximately 60 percent of the patients referred for sleep studies needed them and approximately 40 percent did not.

SDI's sleep studies were of very poor quality, lacked analysis, and were often contradictory in their conclusions. Ms. Steljes also told the Government's investigators that reports appeared to be signed with a signature stamp for Dr. Awerbuch and another physician, Dr. Susan Sprau. She also reported that she had attempted to meet with the staff physicians who signed the SDI sleep study reports but was not allowed to do so.

The affidavit also listed three Medicare physician consultants who provided medical opinions regarding the legitimacy of the studies or tests performed by SDI and the cardiac diagnostic companies and/or opinions regarding medical billing practices of SDI, the referring physicians and the cardiac diagnostic companies. According to the affidavit, these consultants advised the Government that the cardiac risk assessment tests cannot appropriately be prescribed in conjunction with routine sleep studies and that the tests require patients to engage in various activities and responses that cannot be done while a patient is asleep. The consultants also advised that a Holter Monitor test cannot be appropriately billed in conjunction with a sleep study which contains its own cardiac billing parameter.

Based on the Government's analysis of insurance claims records, the affidavit alleged that SDI and the cardiac diagnostic companies billed private insurance and government employee plans twice for the same services. Based on the Government's analysis of CPT billing codes, the companies billed for components of the same tests which resulted in higher payments than justified. The affidavit also alleged that the dates for cardiac risk assessments were altered to indicate that they were performed on different dates than the sleep studies in order to avoid rejection by the insurers or Medicare.

B. Allegations Regarding Tax Evasion.

The affidavit also alleged that there was probable cause to believe that SDI and Todd Kaplan had engaged in tax evasion in violation of 26 U.S.C. §§ 7201, 7202 and 7203. The affidavit listed Todd and Denise Kaplan's adjusted gross income and total tax liability on their Federal Income Tax 1040 forms for the years 1996 through 2000. In the years 1996, 1998 and 1999, the Kaplans reported a negative gross income and paid no taxes. In 1997 the Kaplans reported gross income of $31,679 and a tax liability of $524. The Kaplans also claimed the earned income tax credit for low income taxpayers in 1999 and received a tax refund based on that credit. In 2000, the Kaplans reported gross income of $69,867 and a tax liability of $2,119.

According to the affidavit, other IRS records show that Mr. Kaplan reported $137,833 in wages for 2000. The affidavit also alleged that Mr. Gardner, SDI's former chief operating officer, stated that Todd Kaplan earned $15,000 per month from SDI during 2000 and, therefore, should have reported wages of at least $180,000 from SDI for that year.

The affidavit also alleged that an analysis of the Kaplans' filed income tax returns for 1996 through 2000 indicated "little justification for their current lifestyle." Although the Kaplans reported negative gross income or only modest income in 1998 and 1999, they paid $9,138 and $11,916 in mortgage interest in those years. Between 1996 and 2001, the Kaplans purchased several expensive automobiles and on their credit applications for the purchase of these vehicles, the Kaplans listed substantially greater monthly income than they reported on their tax returns. In 1998, 1999 and 2000, Mr. Kaplan also submitted financial statements to a bank which also indicated that he had annual employment income and interest income substantially greater than the annual employment or interest income listed on the Kaplans' tax returns. Based on the foregoing information, the affidavit alleged that the Kaplans substantially under-reported their gross income in 1996-2000.

The affidavit also alleged that SDI significantly under-reported its gross sales on its 2000 tax return. According to the return, SDI reported $9,139,283 in gross sales. The affidavit states, however, that SDI submitted a report to Dun & Bradstreet for the period ending December 31, 2000 which listed its gross sales as $10,640,545, thus indicating that SDI under-reported its 2000 income by approximately $500,000. The affidavit also states that SDI was also required to withhold and pay to the IRS employee taxes and file quarterly IRS statements for employment withholding taxes. The affidavit alleged, however, that SDI did not file quarterly 941 forms or pay employee withholding taxes as required during 1996- 2000. Finally, the affidavit stated that Todd Kaplan incorporated Comprehensive Cardiac Care as a corporation in 2000. The affidavit alleges, however, that no corporate income tax return was filed for this corporation in 2000 as required by law. *Id.,* ¶67, p. 34.

2. Preparation and Issuance of "Affidavit For Search Warrant" and "Search Warrant."

Ms. Bomstad's affidavit included a list of the items sought to be seized. *Government's Exhibit 1-B,* ¶14, pages 11-16. Ms. Bomstad also prepared attachments "A" and "B" for the proposed search

warrant. *Government's Exhibit 1-A*. Attachment "A" was a description of the premises to be searched - SDI's corporate headquarters located in Westlake Village, California. Attachment "B" listed 24 separate categories of documents or records that the Government sought to seize and provided a description of the protocol to be used by the Government in searching for and seizing documents and records located in SDI's computer data bases. *Government's Exhibit 1-A*. The list of items to be seized in Attachment "B" was substantially identical to the list of items set forth in paragraph 14 of Ms. Bomstad's affidavit.

Ms. Bomstad testified that on January 28, 2002, she took her 34 page affidavit and Attachments "A" and "B" to the Assistant United States Attorney in the Central District of California (Los Angeles, California). The affidavit and the attachments were reviewed by Assistant United States Attorney (AUSA) Andrew Cowan. AUSA Cowan's office filled out the search warrant form and the "affidavit cover sheet" used in the Central District of California. *Government's Exhibit 1-A*. Ms. Bomstad testified that AUSA Cowan also suggested certain unspecified revisions to Ms. Bomstad's affidavit to comply with the requirements of the Central District. Ms. Bomstad reviewed these revisions with the AUSA in Nevada who approved them.

The document that Agent Bomstad referred to as the "affidavit cover sheet" is a form "Affidavit for Search Warrant" to which her 34 page affidavit was attached. *Government's Exhibit 1-B*. This "Affidavit for Search Warrant" incorporated Agent Bomstad's affidavit through the following language:

> Affiant states the following facts establishing the foregoing grounds for issuance of a Search Warrant [:]
>
> (SEE ATTACHED AFFIDAVIT WHICH IS INCORPORATED AS PART OF THIS AFFIDAVIT FOR SEARCH WARRANT)

Government's Exhibit 1-B.

The completed "Search Warrant" form stated as follows:

> TO: ANY AGENT(S) OF THE INTERNAL REVENUE SERVICE, CRIMINAL INVESTIGATION OR ANY OTHER AUTHORIZED OFFICER(S)
>
> Affidavit(s) having been made before me by the below-named affiant that he/she has reason to believe that on the premises known as:

SEE ATTACHMENT A

in the Central District of California there is now being concealed certain property, namely:

SEE ATTACHMENT B

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

YOU ARE HEREBY COMMANDED to search on or before ten (10) days (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime - - 6:00 A.M. to 10:00 P.M.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to the duty U.S. Magistrate Judge as required by law.

Government's Exhibit 1-A.

Ms. Bomstad testified that she took the "Affidavit for Search Warrant" and the search warrant with Attachments "A" and "B" to Magistrate Judge Hillman, who took them into his chambers where he remained for approximately two hours. From time to time, Judge Hillman came out of his chambers and asked Ms. Bomstad questions regarding the meaning of certain terms contained in the 34 page affidavit. At one point, the magistrate judge expressed concern about the handling of confidential patient records and asked that Ms. Bomstad's affidavit be revised to include instructions that would ensure greater protection for the confidentiality of patient information. Ms. Bomstad consulted with the AUSA in Nevada regarding these changes to the affidavit, which were then made in Las Vegas and faxed to Ms. Bomstad at Judge Hillman's chambers. These revisions are contained in paragraph 14.e. at pages 15-16 of Ms. Bomstad's affidavit. *Government's Exhibit 1-A*. Agent Bomstad testified that Judge Hillman also added the following handwritten sentence at the end of Attachment "B":

8. Patient Confidential medical information shall be handled in accordance with the procedures set forth in the Affidavit.

Government's Exhibit 1-A.

After the foregoing changes were made to Ms. Bomstad's affidavit and attachment "B" to the search warrant, Agent Bomstad signed the affidavits and Judge Hillman issued the search warrant. The

"Affidavit for Search Warrant" was sealed by an order entered by Magistrate Judge Hillman.

3. Execution of Search Warrant.

Ms. Bomstad testified that a pre-search meeting was held in Encino, California on January 30, 2002 and was attended by the 42 agents participating in the execution of the search warrant. Ms. Bomstad testified that the search team was comprised of agents experienced in conducting federal searches and that the core of the search team was comprised of agents experienced in and familiar with health care investigations. According to Ms. Bomstad, she informed the search team that the crimes for which SDI and Todd Kaplan were being investigated were health care fraud and tax evasion. She testified that the agents were verbally informed about the scope of the Government's investigation of SDI and Todd Kaplan and the documents to be seized during the search.

Ms. Bomstad testified that copies of the affidavit and the search warrant were distributed during the meeting and the agents were instructed to read the affidavit as well as the search warrant and its attachments. Ms. Bomstad testified that a written search warrant plan was prepared regarding the proposed search. On motion by the Defendants, the Court ordered that redacted portions of this plan relevant to Ms. Bomstad's testimony be produced. *Defendant's Exhibit "DDD"*. This search warrant plan stated that a copy of the search warrant would be read during the briefing and initialed by all participating agents. Although each agent signed a roster of persons who attended the pre-search meeting, *Government's Exhibit 1-C,* neither the roster, the search warrant plan, nor any other written document introduced in evidence specifically stated that each agent was also required to read the affidavit.

The search commenced at approximately 7:00 a.m. on January 31, 2002. Ms. Bomstad testified that upon making entry into the SDI offices, the agents deployed throughout the offices for purposes of securing the premises and the documents therein, and to contact any employees or other persons on the premises to ensure that they did not remove records or interfere with the computer system. The agents responsible for inventorying the records to be seized also set up a location in the conference room where they would conduct that activity. Ms. Bomstad testified that before the agents began the process of actually reviewing documents to determine if they were subject to seizure, or accessing the SDI computer system(s), agents made a videotape record of the SDI premises, on both the first and second

floors.

The videotape shows that the agent(s) videotaping the second floor entered the offices of a company known as Spectramed and videotaped the interior of that office. The search warrant did not authorize the Government to search any premises other than those of SDI. Although the Government videotaped the interior of Spectramed's office, Ms. Bomstad testified that the Government did not otherwise inspect the records in that office or seize any records in Spectramed's office. The inventory of documents seized from SDI's offices, *Government's Exhibit 1-F*, page 31, indicates that the Government seized a Spectramed-SDI contract, but indicates that this document was seized from an SDI employee's office.

After arriving at SDI's offices, Ms. Bomstad met Robert Kaplan, an officer and employee of SDI, and handed him a copy of the search warrant. Because the affidavit was sealed, Ms. Bomstad did not provide a copy of the affidavit to Robert Kaplan or any other representative of SDI. She states, however, that the affidavit was available during the search for reference by any member of the Government's search team.

Ms. Bomstad testified that during the first hour of the search, an employee of SDI informed her that many of the documents listed in Attachment "B" to the search warrant were located in an offsite storage facility. Ms. Bomstad testified that Robert Kaplan confirmed that SDI records were stored in an offsite storage facility. Robert Kaplan stated that he did not know the address of the offsite storage facility, but he was willing to give consent to permit the Government to search the storage facility for records in accordance with Attachment "B" of the search warrant. At the agents' request, Robert Kaplan signed a handwritten consent to search document that was witnessed by Ms. Bomstad and two other female Government agents. *Government's Exhibit 1-D.* Ms. Bomstad testified that her encounter with Robert Kaplan regarding her request for consent to search the storage facility was cordial and cooperative.

Robert Kaplan's testimony regarding his written consent to search the storage facility sharply conflicted with the testimony of Agent Bomstad. Robert Kaplan testified that he was sitting with Jack Brunk at approximately 7:00 a.m. when he looked out an interior window in the office and observed several Government agents inside the office. Robert Kaplan testified that he stood up, at which point,

an agent sternly instructed him to take his hands out of his pockets. He was then escorted to a conference room in the office. The agents demanded that he give them the password codes to SDI's computer system – otherwise the Government would seize the computers and take them away and SDI would never see them again.

Robert Kaplan testified that Agent Bomstad and another female agent acted out "good cop/bad cop" roles regarding obtaining his consent to search the offsite storage facility. According to Robert Kaplan, the other agent whose identity he does not know or recall, acted in a friendly manner toward him and advised him that it would be best for everyone if he gave consent to search the offsite storage facility. Robert Kaplan testified that Ms. Bomstad acted the part of the "bad cop" by telling him that if he did not consent to the search of the storage facility, the Government would, in any event, seize the records. He also testified that Ms. Bomstad called him a liar when he told her that he did not know the address of the storage facility. Robert Kaplan also testified that he saw the "entry tools" that the agents had brought with them, including a crow bar and grappling hook. Although the agents did not point any guns at him, Robert Kaplan observed that Ms. Bomstad was armed.

On cross-examination, Robert Kaplan acknowledged that at the time of the search, he knew where the storage facility was located, but did not know the street address. Although Robert Kaplan acknowledged that the written consent to search stated that he knowingly and voluntarily gave his consent, Robert Kaplan testified that he signed the consent to search because he feared that the Government agents would break into the storage facility, damage the property, and seize the records anyway.

After Robert Kaplan signed the written consent to search the storage facility, SDI's president, Todd Kaplan, arrived at the SDI offices. Ms. Bomstad testified that Todd Kaplan was also provided with a copy of the search warrant, and she told him that he and SDI were being investigated for criminal violations of the health care fraud and tax laws. Ms. Bomstad also obtained a signed written consent from Todd Kaplan to search the offsite storage location. *Government's Exhibit 1-E.* Todd Kaplan contacted the person who was in charge of the storage location and obtained the address of the facility for the Government's agents and gave the person authorization to permit the Government access to the storage facility. Ms. Bomstad testified that no threats or coercion were used to obtain Todd Kaplan's

written consent to search the storage facility. No testimony was adduced from the defense witnesses regarding the circumstances under which Todd Kaplan's consent to search the storage facility was obtained.

Ms. Bomstad testified that at some point during the first two hours of the search, Todd Kaplan informed the Government agents that some of the documents on SDI's premises might be protected by the attorney-client privilege. Upon learning this, the search team ceased its search and two federal agents who were not involved in the search were summoned to the SDI office to identify allegedly privileged documents in the locations pointed out by Todd Kaplan. After the allegedly privileged documents were identified and segregated, the search team proceeded with its search. The privileged documents were left at SDI premises when the search concluded. Ms. Bomstad also testified that during the search, an SDI attorney came to the offices and was present for most of the day.

According to Ms. Bomstad, SDI employees informed the agents that SDI's business was operated from computers in a "paperless" manner. After obtaining the computer passwords, the agents copied the computer hard drives onto equipment they brought with them, through a process known as "mirroring," so that SDI could continue to operate its business. Prior to and at the time of the evidentiary hearing, the Government asserted that it was able to retrieve SDI's computer data records through the mirroring process and, therefore, the Government's agents did not seize or remove any of SDI's computer equipment.

Ms. Bomstad testified that search agents assigned to that task prepared computer inventories of the documents and things seized from SDI's offices and the offsite storage facility. The search concluded at approximately 10:00 p.m. The search team gave the SDI officers separate printed inventories for the documents seized from SDI's offices and from the offsite storage location. During Ms. Bomstad's direct testimony, the Government introduced the two inventories that the agents prepared at the time of the search, one listing the items seized from SDI's corporate offices and the other listing the items seized from the offsite storage facility. *Government Exhibits 1-F* and *1-G*. On cross-examination, however, defense counsel showed Ms. Bomstad another printed inventory for the property seized from SDI's corporate offices which included a final, "add-on," handwritten inventory entry stating that the Government seized and removed two computer servers during the search.

Defendants' Exhibit "BBB".[4] Defendants' counsel also introduced a letter to the United States Attorney, dated July 25, 2002, regarding the seizure of SDI's servers. *Defendants' Exhibit "AAA".* Ms. Bomstad could neither confirm nor refute that *Defendants' Exhibit "BBB"* was prepared and left at the premises by the Government's agents on January 31, 2002, and she appeared to have no personal knowledge or recollection whether the two servers were, in fact, seized and removed by the Government. Robert Kaplan testified that the two servers were present in the computer room when the search commenced on January 31, 2002, but were no longer there when the agents departed. Robert Kaplan testified that it was several days before SDI could resume its business operations.

Defendants contend that the Government seized 567 boxes of documents and seven file cabinets of documents and "close to one terabyte of electronic data." According to the Defendants, the Government seized approximately 90 percent of SDI's paper documents and 100 percent of its computer or electronic files during the search. Robert Kaplan and Jack Brunk testified that they determined the percentage amount of paper documents seized from SDI based on their visual observation of what was present before the search began and what was left after the agents departed.

The videotape of SDI's offices indicates that there was less paper visible in the offices after the search ended than when it began. The post-search videotape indicates that after the search and seizure was completed, various books, papers, plaques and other items still remained in the SDI offices. The videotape does not provide an independent basis upon which to determine the amount of paper that was seized and, therefore, does not confirm or refute Defendants' assertion that the Government seized 90 percent of SDI's paper business records.

According to Robert Kaplan and Jack Brunk, the Government's agents seized Jack Brunk's personal tax and financial records, assembly and restoration manuals for Corvette automobiles, bills for vitamin supplies purchased by an SDI employee, videotapes from leadership and business clubs, paperwork from a typewriter ribbon company started by Defendant Kaplan in 1980, which he no longer operated at the time SDI was incorporated in 1994, records from another company that Kaplan worked

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[4]Robert Kaplan testified that he found this inventory, *Defendants' Exhibit "BBB,"* in the SDI offices after the agents left on the evening of January 31, 2006. He testified that this inventory remained in the possession of SDI until shortly before the evidentiary hearing in this matter.

for before SDI opened, and business records for another company that Kaplan owned which had no connection to SDI.

Defendants also state that after the Indictment was filed in this case in March 2005, the Government returned to SDI 362 of the 567 boxes seized during the search. Defendants argue that the return of these documents is an implied concession that the Government seized SDI's business records that had no legitimate relationship to the criminal investigation or purpose of the search warrant. The Government acknowledges that it returned a substantial number of documents to the Defendants after the filing of the Indictment but disputes that the return of these documents is a concession that the search warrant was overbroad. Rather, the Government contends it decided to base its prosecution of SDI, Todd Kaplan and Jack Brunk on approximately 570 randomly selected sleep study patient files. To prove that the alleged fraud encompassed SDI's other patient files and billings, the Government intends to present expert witness statistical-survey testimony. Because the Government will not be relying on the other patient files and insurance claim/billing records to prove its case against Defendants, the Government contends that it no longer needed the other records and, therefore, returned them to Defendants.

DISCUSSION

1. Defendants Kaplan's and Brunk's Standing to Challenge Search and Seizures Under the Fourth Amendment.

The Government argues that Defendants Todd Kaplan and Jack Brunk lack standing to challenge the seizure of SDI's business records either from the corporate offices of SDI or the off-site storage location because, as employees or officers of SDI, they did not have a reasonable expectation of privacy in those business records or the premises where they were located. The Government does not contest Defendant SDI's standing to challenge the seizure of its business records under the Fourth Amendment.[5]

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[5]A corporation is generally deemed to have standing with respect to searches of corporate premises and seizures of corporate records. *United States v. Leary*, 846 F.2d 592, 596 (10th Cir. 1988), quoting 4 W. LaFave, *Search and Seizure* § 11.3(d)(2d ed. 1987); citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 629, 50 L.Ed.2d 530 (1977); *Auster Oil & Gas, Inc. v. Stream*, 835

In *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the Supreme Court abandoned the terminology of "standing" as the basis for analyzing claims of violations of the Fourth Amendment in favor of an analysis focusing on whether the individual movant's Fourth Amendment rights were infringed by the search and seizure. *See also Minnesota v. Carter*, 525 U.S. 83, 88. 119 S.Ct. 469, 142 L.Ed.2d 373 (1998). Despite the Supreme Court's disapproval of "standing" terminology, the courts have continued to refer to these issues in terms of "standing." Thus, in *United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999), the court set forth the basic requirements for a defendant to assert a Fourth Amendment violation as follows:

> To establish standing to challenge the legality of a search or seizure, the defendants must demonstrate that they have a "legitimate expectation of privacy" in the items seized or the area searched. *United States v. Padilla,* 508 U.S. 77, 82, 113 S.Ct. 1936, 123 L.Ed.2d 635 (1993) (per curiam) ("*Padilla I* "); *see also Rakas v. Illinois,* 439 U.S. 128, 143-44, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). To demonstrate this, the defendants must manifest a subjective expectation of privacy in the area searched, and their expectation must be one that society would recognize as objectively reasonable. *See United States v. Echegoyen,* 799 F.2d 1271, 1277 (9th Cir.1986) (citing *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)). The defendants have the burden of establishing that, under the totality of the circumstances, the search or seizure violated their legitimate expectation of privacy in the storage room. *See Rawlings v. Kentucky,* 448 U.S. 98, 104, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *United States v. Kovac,* 795 F.2d 1509, 1510 (9th Cir.1986).

The fact that a defendant is a target of an investigation does not confer automatic standing on the defendant to challenge the search and seizure of another's premises or property. In *United States v. Padilla*, 508 U.S. 77, 82, 113 S.Ct. 1936, 123 L.Ed.2d 635 (1993), the Court overruled the Ninth Circuit's "co-conspirator exception" which provided that a co-conspirator's participation in an operation or arrangement that indicates joint control or supervision of the place searched establishes standing. In so holding, the Court stated that violations of the Fourth Amendment can only be challenged by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and co-defendants have been accorded no special standing.

F.2d 597 (5th Cir. 1988).

In *Lagow v. United States*, 159 F.2d 245, 246 (2d Cir. 1946), *cert. denied*, 331 U.S. 858, 67 S.Ct. 1750, 91 L.Ed. 1865 (1947), the court held that a corporate officer, even if the sole shareholder, could not vicariously assert the violation of the corporation's Fourth Amendment rights regarding the seizure of corporate records because he had no ownership interest in the records. Subsequent cases tempered this rule based on the circumstances of the particular case, *e.g. Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed2d 697 (1960); *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968). In *United States v. Britt,* 508 F.2d 1052, 1055 (5th Cir. 1975), however, the court held that the *Lagow* rule remains applicable in situations where a defendant seeks to suppress illegally seized corporate records simply because he is a corporate officer. *Britt* held that the president and sole shareholder of the corporation in that case did not have standing to challenge the seizure of corporate records from an office used as a "storage area" where the records were normal corporate records that were not prepared personally by the defendant. The defendant did not personally use the office for work and was not present during the search. The purpose of the search was not directed at him, and no records were seized from his personal desk, briefcase or files.

In *United States v. Lefkowitz,* 618 F.2d 1313, 1316 n. 2 (9th Cir. 1980), the court, in a relatively brief footnote, held that the president and secretary of corporations had standing to challenge the government's search of the corporate offices and seizure of corporation records. In so holding the court stated:

> The Government correctly notes that Lefkowitz does not have standing merely because he was a corporate officer, *United States v. Britt*, 508 F.2d 1052, 1055(5th Cir. 1975), and that mere presence at a search does not automatically impart standing, *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Applying these rules, however, the court below nevertheless found that Lefkowitz had "a sufficient proprietary interest in the suite, which was the target of the search and where the corporate records were seized, to impart standing." This finding is amply supported in the record.

The district court opinion in *United States v. Lefkowitz,* 464 F.Supp. 227 (C.D.Cal. 1979), stated that the corporate office searched by the government was also the office where the corporation's president and secretary maintained their employment. In refusing to restrict the defendants' standing to challenge only the seizure of records from the defendants' personal offices and desks, the district court further stated:

> The fact that Lefkowitz and Sullivan did not reserve exclusive use of the entire suite does not, in and of itself, vitiate a finding of a reasonable expectation of privacy. See Mancusi v. DeForte, supra at 368-9, 88 S.Ct. 2120. The suite was apparently not open to the general public. Both Lefkowitz and Sullivan could reasonably expect that the "private" suite, where both were employed, would be permissibly entered only by the employees of the corporations and those individuals receiving permission from the appropriate individuals. This expectation of privacy would be infringed, as it was in the case at bar, by the examination and seizure of such corporate records by government officials.

Although the *Lefkowitz* decisions have occasionally been cited on the issue of standing by other circuit court opinions, *see United States v. Chuang*, 897 F.2d 646, 649 (2d Cir. 1990); *United States v. Leary*, 846 F.2d 592, 596 (10th Cir. 1988), *Lefkowitz* has not been cited on the standing issue by later Ninth Circuit decisions. The cases cited by the Government that an employee's privacy interest is limited only to the areas given over to the employee's "exclusive use" did not involve Fourth Amendment claims made by corporate owners and officers under facts similar to *Lefkowitz* or this case. *See United States v. Taketa*, 923 F.2d 665 (9th Cir. 1991); *Schowengerdt v. General Dynamics Corp.,* 823 F.2d 1328 (9th Cir 1987); *United States v. Silva,* 247 F.3d 1051,1056 (9th Cir. 2001);and *United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999).

In *United States v. Gonzalez, Inc.*, 412 F.3d 1102 (9th Cir. 2005), the court held that the individual owners/officers of a public bus company had standing to challenge the legality of intercepted communications pursuant to a wiretap on the company's telephones even though the defendants did not personally participate in the intercepted calls. The court noted that the Supreme Court has interpreted the provisions of the federal wiretap statute to limit standing to persons whose Fourth Amendment rights were violated by the interception. *Alderman v. United States*, 394 U.S. 165, 175-76, 89 S.Ct. 961 (1969). The court, citing *Alderman*, stated that an owner of premises where the wiretap was placed has standing to challenge illegal wiretaps even if he did not participate in the intercepted conversations. The government attempted to distinguish *Alderman* on the grounds that it involved the wiretapping of a residence as opposed to a commercial property. In rejecting this distinction, the court stated that the subject office was a small, family-run business housing only 25 employees at its peak. In such an office, individuals who own and manage the business operation have a reasonable expectation of privacy over the onsite business conversations between their agents. Defendants not only owned the business

premises, they also exercised full control over access to the building as well as managerial control over its day-to-day operations and had a reasonable expectation of privacy regarding calls made on the premises. Although *Gonzalez* did not cite *Lefkowitz* or other cases involving the standing of corporate officers or employees to challenge the search and seizure of corporate offices and records, it appears consistent with *Lefkowitz* and other decisions involving such searches and seizures.

In *United States v. Mancini*, 8 F.3d 104 (1st.Cir. 1993), the court stated the following factors are relevant to the standing determination: ownership, possession and/or control; historical use of the property searched or the thing seized; ability to regulate access; the totality of the surrounding circumstances; the existence or non-existence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of the case. The court also stated that it takes notice of the position of authority of the person asserting violation of his or her Fourth Amendment rights. *Mancini*, 8 F.3d at 109, *citing United States v. Brien,* 617 F.2d 299, 306 (1st Cir. 1980). More specifically, *Mancini*, stated that in determining the expectation of privacy of corporate employees in business records seized from areas of the corporate offices other than their own work stations, the following factors are considered: (1) each defendant's position in the firm; (2) his ownership interest; (3) his responsibilities; (4) his power to exclude others from the area; (5) whether he worked in the area; and (6) his presence at the time of the search. It is also relevant whether the office in question was noteworthy for its extreme security measures. *Mancini* also noted that some standing decisions turn on the applicability of certain business regulations that may reduce one's reasonable expectation of privacy. *United States v. Leary*, 846 F.2d 592, 596 (10th Cir. 1988) and *United States v. Chuang*, 897 F.2d 646, 649-51 (2d Cir. 1990), *cert denied,* 498 U.S. 824, 111 S.Ct. 77, 112 L.Ed.2d 50 (1990).

In *Leary*, the court held that defendants' expectation of privacy in their arms export company's records was not lost by the fact that they had previously participated in a voluntary open door policy which allowed custom agents to inspect their records. Because the defendants had the right to terminate the voluntary inspections and require the government to obtain a search warrant, the agreement was not sufficient to overcome defendants' reasonable expectation of privacy in the company's records. In *Chuang,* however, the court held that a lawyer and bank officer, who operated his law practice on the same premises as the bank, had a substantially reduced expectation of privacy in the premises and the

bank records because the bank was a closely regulated business whose records were subject to routine examination by the Comptroller of the Currency.

It is this latter factor that the Government places substantial reliance on in arguing that because SDI was a closely regulated health services company, Defendants Kaplan and Brunk had essentially no expectation of privacy in SDI's records and therefore no standing to challenge the search and seizure of SDI records. In support of these arguments, the Government attached to its Opposition portions of a Department of Health and Human Services' manual that provides for administrate inspections under the authority of the Health Insurance Portability Amendments Act ("HIPAA"), 42 U.S.C. § 1395ddd. The portion of the manual attached to the Government's Opposition appears to deal with records reviews of health care providers where there is an issue of overpayment of Medicare benefits. The Government has also referenced 18 U.S.C. § 3486 which authorizes the Department of Justice to issue subpoenas to health care providers who are merely suspected of criminal health care fraud offenses to obtain records relevant to the investigation.

In *New York v. Burger*, 482 U.S. 691, 699-700 (1987), the Court upheld a state statutory scheme providing for warrantless inspections of "closely regulated" businesses (in that case junkyards) as a form of special needs inspections that are beyond the normal need for law enforcement and which make the warrant and probable cause requirements impracticable. The Court based its approval of such warrantless inspection schemes on the grounds that a business or commercial enterprise has a lower expectation of privacy than does an individual in his home. Warrantless inspections of closely regulated businesses are proper where the regulations are designed to establish how the business should be operated and inspection is conducted to ensure that those rules are followed. Such a regulatory approach contrasts with the penal laws, a major emphasis of which is the punishment of individuals for specific acts of misbehavior. *New York v. Burger, supra,* 482 U.S. 691, 712-713.

It does not follow, however, that where the Government is pursuing a criminal investigation of a business or its employees, that the Government is not required to obtain a search warrant in compliance with the probable cause and particularity requirements of the Fourth Amendment. If the primary focus of a warrantless search is ordinary crime control, it cannot be justified under a special needs exception to the Fourth Amendment. *See United States v. Jones,* 286 F.3d 1146 (9th Cir. 2002) (warrantless

search of employee's office for evidence of a crime not justified under "government employee exception"); *City of Indianapolis v. Edmund*, 531 U.S. 32, 121 S.Ct. 447 (2000) (highway checkpoint program whose primary purpose was to detect narcotics smugglers violated Fourth Amendment). *See also Griffin v. Wisconsin,* 483 U.S. 868, 872 (1987).[6]

Similarly, the Government's argument that it could have subpoenaed SDI's business records under 18 U.S.C. § 3486, did not eliminate its duty to demonstrate probable cause and comply with the particularity requirement of the Fourth Amendment where it chose to proceed by search warrant. As stated in the two cases cited by the Government, *Doe v. United States*, 253 F.3d 256 (6th Cir. 2001) and *In re Subpoena Duces Tecum (United States v. Bailey)*, 228 F.3d 341 (4th Cir. 2000), there is an important distinction between seizing records pursuant to a search warrant versus subpoenaing the records pursuant to a statute such as 18 U.S.C. § 3486. In *In re Subpoena Duces Tecum, supra,* the Fourth Circuit explained this distinction as follows:

> A warrant is a judicial authorization to a law enforcement officer to search or seize persons or things. To preserve advantages of speed and surprise, the order is issued without prior notice and is executed, often by force, with an unannounced and unanticipated physical intrusion. *See Marshall v. Barlow's Inc.*, 436 U.S. 307, 316 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (recognizing that search warrants may be "executed without delay and without prior notice, thereby, preserving the element of surprise.") Because this intrusion is both an immediate and substantial invasion of privacy, a warrant must be issued only by a judicial officer upon a demonstration of probable cause -the safeguard required by the Fourth Amendment. (Citations omitted) The demonstration of probable cause to a "neutral and detached judicial officer" places a "checkpoint between the Government and the citizen" where there would otherwise be no judicial supervision. *Steagald v. United States*, 451 U.S. 204, 212, 101 S.Ct. 16421, 68 L.Ed.2d 38 (1981).

Doe v. United States also states that in the case of a subpoena issued under 18 U.S.C. § 3486, the person has the opportunity to object and obtain judicial review before production is compelled. Thus, the lower "reasonably relevant" standard for obtaining records pursuant to a subpoena cannot be substituted as the standard for obtaining a search warrant governed by the Fourth Amendment.

In support of their position, Defendants Kaplan and Brunk argue that SDI is a small, closely

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[6]Because the Government did not seize SDI's records as part of an administrative review of SDI's records, the Court is not called upon to decide whether the procedures adopted in the manual are legally valid under the Fourth Amendment.

held corporation. At the time of the search, Defendant Todd Kaplan owned 48 percent of SDI's stock, and was a corporate director and the president/chief executive officer of the corporation. Defendant Brunk owned 11 percent of the corporate stock. Defendant Brunk was also a corporate director and was the vice-president of SDI in charge of clinical services. The remaining stock of the company was owned by other officers, employees and non-employee investors. SDI employed approximately 40-50 persons in its corporate headquarters in Westlake Village, California. According to Defendant Brunk at the time of the search, SDI had approximately 300-400 employees in its other offices located around the country. Defendants Kaplan and Brunk both maintained their offices in SDI's corporate headquarters and their personal offices were searched and records were seized from their offices. Defendant Brunk was present at the SDI offices when the search began and remained at the premises until the search was concluded. Defendant Todd Kaplan arrived at the offices after the search began and was requested by Agent Bomstad to give consent to the search of the offsite storage facility. During the search, Defendant Kaplan also identified allegedly attorney-client privileged materials to the agents.

Robert Kaplan and Jack Brunk both testified regarding the measures taken by SDI to maintain the security and privacy of its business premises and records. They testified that the public is generally not allowed into the office beyond the reception-lobby area. Defendant Brunk testified that if a non-employee had business at the SDI headquarters, he or she generally had a pre-arranged appointment and would be met by the company employee or officer, or escorted to the appropriate office upon arrival. The SDI offices are locked and alarmed at night. Robert Kaplan and Defendant Brunk also testified that most of SDI's patient records were kept on the computer system. The computer servers were located in a secure area of the premises and employee access to the computers was governed by different levels of password access depending on their employment duties. SDI did not use email or have its computers connected to outside lines for security purposes.

Defendant Brunk testified that access to patient records was restricted to SDI employees performing duties in regard to those files, the patient, his or her physician and the insurance company or plan that covered the patient. Defendant Brunk testified that if a representative of Blue Cross/Blue Shield, for example, requested to inspect or obtain records of patients it insured or covered, he or she would be allowed to do so consistent with the legal right of the provider to review such records. He

indicated that this was a frequent occurrence. Defendant Brunk testified, however, that SDI would not have allowed an insurer to review files of patients it did not insure or cover. He also testified that if an FBI agent had requested to review patient files or other company records or had served a subpoena for SDI records, he would have consulted with SDI counsel before granting access to the records.

Defendant Brunk testified the agents seized his personal tax returns and diploma certificates from his office. Robert Kaplan also testified that agents seized car manuals, records of unrelated companies from his office and an area outside his office. No specific testimony was provided regarding what records were seized from the office of Defendant Todd Kaplan. The Government's Inventory Listing of All Items Seized At Search Warrant Site, *Government's Exhibit 1-F*, however, contains a brief item-by-item description of the documents and records seized and where they were located and found. Control numbers 181, 182, 183, 184, 194, 195, 196, 203, 204, 205, 207, 214, 216, 226, 228, 246, 247, 262, 263, 275, and 284 list the items that were seized from the office of T. Kaplan, which the Court infers is the office of Defendant Todd Kaplan. Control numbers 257, 272, 273, 277, 278, and 306 list items seized from the office of Defendant Jack Brunk.

In regard to the records stored in the offsite storage facility, Mr. Brunk testified that some patient records were located in that facility. Otherwise, neither he nor Mr. Kaplan testified what specific records were located in the storage facility. Mr. Kaplan testified, however, that SDI did not dispose of records and kept everything from its inception. Robert Kaplan's testimony indicates that access to SDI's records at this storage facility was restricted and as evidenced by the consents to search and Agent Bomstad's testimony, assistance had to be obtained from SDI's officers for the Government to gain access to these records.

Relatively speaking, SDI was a moderate size company employing approximately 40-50 employees at its corporate headquarters and several hundred others at other locations around the country. Both Defendants Kaplan and Brunk had significant ownership interests in the company, were corporate directors and upper managerial employees of the company who exercised a high level of authority over the operations of SDI. Given their positions in the company, the Court is satisfied that both Defendant Kaplan and Brunk had the authority to control and set policy regarding access to SDI's records. Both Defendants maintained offices at the corporate headquarter which were searched by the

agents. Both Defendants were present during the search. The evidence also establishes that SDI maintained a level of security and confidentiality practices regarding its premises and records that one would reasonably expect of a health care provider. Access to patient or other company business records was restricted to employees performing job duties relating to those records, and to the patient, his or her physician or insurance carrier. Based on Robert Kaplan's testimony, SDI arguably maintained a higher than average level of security regarding its computer system. Employee access to computer records was restricted by different levels of password access based on the employees' job duties. Only Robert Kaplan or upper management had general access to the entire computer system. SDI did not have an email system or external connections to its computer system.

Although Medicare and other insurers were entitled to administratively review SDI patient and billing records without a warrant, the Court does not find that this was sufficient to extinguish Defendants' reasonable expectation of privacy or right to challenge the search warrant in this case. Such a conclusion would be contrary to cases such as *United States v. Jones,* 286 F.3d 1146 (9th Cir. 2002), in which the courts have refused to permit warrantless searches for purposes of a criminal investigation, notwithstanding that a warrantless search could have been conducted for some other purposes within one of the "special needs" exceptions to the warrant requirement. Based on the forgoing facts and circumstances, the Court finds that Defendants Todd Kaplan and Jack Brunk have standing to challenge the search and seizure of SDI records from the corporate headquarters and off-site storage facility maintained by SDI.[7]

2. Particularity of Search Warrant.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched and the persons or things to be seized." *U.S. Const. Amend. IV.* The particularity requirement of the Fourth Amendment "makes 'general searches under [a warrant] impossible and prevents seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'" *United States v.*

[7]Defendant Kaplan clearly also has standing to challenge the seizure of his personal income tax and financial records.

Bridges, 344 F.3d 1010, 1016 (9th Cir. 2003), *citing United States v. Cardwell,* 680 F.2d 75,77 (9th Cir. 1982), quoting *Marrion v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927). *Bridges* further states:

> The Fourth Amendment requires search warrants to state with reasonable particularity what items are being targeted for search or, alternatively, what criminal activity is suspected of having been perpetrated. *Marrion v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927). Otherwise, the officers charged with executing the search are left to speculate as to what is the underlying purpose or nature of the search. The executing officers must be able to identify from the face of the warrant, as well as any attached or expressly incorporated documents, what it is they are being asked to search for and seize from the targeted property.

344 F.3d at 1016-17.

Quoting *United States v. Rude*, 88 F.3d 1538, 1551 (9th Cir. 1996), *Bridges* also states, however:

> Yet, "[w]hile a search warrant must describe items to be seized with particularity sufficient to prevent a general, exploratory rummaging into a person's belongings, it need only be reasonably specific, rather than elaborately detailed, and the specificity required varies depending on the circumstances of the case and the type of items involved."

To determine whether a warrant lacks sufficient specificity, the courts must examine both the warrant's particularity and its breadth. The courts consider one or more of the following factors in determining whether a description is sufficiently precise: (1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. *Center Art Galleries – Hawaii, Inc. v. United States*, 875 F.2d 747, 749 (1989), *citing United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986).

The Ninth Circuit has also stated that generic classifications of documents in a warrant are acceptable only when a more precise description was not possible based on the information available to the Government at the time the warrant was issued. *United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004)*; United States v. Kow*, 58 F.3d 423, 427 (9th Cir.1995). The court has also stated, however, that "when probable cause exists, 'all items in a set of files may be inspected during a search, provided that

sufficiently specific guidelines for identifying the documents sought are provided in the search warrant and are followed by the officers conducting the search.'" *United States v. Hayes*, 794 F.2d 1348, 1355 (9th Cir. 1986), quoting *United States v. Tamura*, 694 F.2d 591, 595 (9th Cir. 1982).

Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), is arguably the leading Supreme Court decision regarding the degree of particularity required in a search warrant relating to evidence of fraudulent business practices. In *Andresen*, the state established probable cause to believe that the petitioner, an attorney, had committed fraud on the purchaser in a transaction involving a real estate parcel known as "Lot 13T in the Potomac Woods Subdivision of Montgomery County." The state obtained search warrants to search defendant's offices and seize documents relating to the transaction. In holding that the search warrants described the documents to be seized with sufficient particularity, the Court noted that the warrants began by stating that:

> "[T]he following items pertaining to the sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland:"

This statement was followed by a lengthy list of various types of documents which the warrant described as "showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses ... together with other fruits, instrumentalities and evidence of crime at this (time) unknown." 427 U.S. at 480, n.10. The Court rejected petitioner's argument that the list of documents to be seized was overbroad and, therefore, constituted a "general" warrant. In so holding, the Court stated:

> Under investigation was a complex real estate scheme whose existence could only be proved by piecing together many bits of evidence. Like a jigsaw puzzle, the whole "picture" of petitioner's false-pretense scheme with respect to Lot 13T could be shown only by placing in proper place the many pieces of evidence that, taken singly, would show comparatively little. The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession."

In *United States v. Cardwell*, 680 F.2d 75,77 (9th Cir. 1982), however, the Ninth Circuit distinguished *Andresen* as follows:

> The warrant at issue in our case is significantly different from the one involved in Andresen. Here there is no preambulatory statement limiting the search to evidence of particular criminal episodes. Thus, our situation

> is more akin to that which would have faced the Andresen Court had no reference to the Lot 13T sale been made. The Court's heavy reliance on the Lot 13T limitation suggests that the omission of such a limitation would have been fatal to the warrant's validity. Andresen clearly does not dictate that appellee prevail in this case.

Defendants rely on a series of Ninth Circuit decisions dating back from *United States Bridges,* 344 F.3d 1010 (9th Cir. 2003), in which the court has declared warrants in violation of the Fourth Amendment's particularity requirement. In *Bridges,* the court held that the government's affidavit was sufficient to support probable cause that defendant had engaged in mail fraud and a conspiracy to defraud the United States by making false claims. The affidavit showed that Defendant operated a tax consulting business, through which he advised clients that they could avoid paying federal income taxes if they declared that they were "non-resident aliens." Defendant's business filed more than 100 claims with the IRS requesting tax refunds for its "non-resident alien" clients none of which were ever granted. Although there was probable cause to issue a search warrant, the court nevertheless held that the warrant's description of the items to be seized violated the particularity requirement of the Fourth Amendment.

The attachment to the warrant in *Bridges* listed thirteen categories of generic types of business records or equipment to be seized, but without any additional description of the items which limited them to the criminal acts described in the affidavit. *Id.* at 1017. Although the list of items and categories of property was detailed, the court found that it was so expansive that its language authorized the government to seize almost all of defendant's property, papers and office equipment.[8] The court, quoting *United States v. Kow*, 58 F.3d 423, 427 (9th Cir.1995), noted that it had "criticized repeatedly the failure to describe in a warrant the specific criminal activity suspected by the Government[.]" The

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[8]The warrant in *Bridges* also contained a "catch-all" provision that authorized "the seizure of records relating to clients or victims 'including *but not limited to'* the specific records listed on the warrant." *Id.,* at 1017. In regard to this provision, the court stated: "If, however, the scope of the warrant is 'not limited to' the specific records listed on the warrant, it is unclear what is its precise scope or what exactly it is that the agents are expected to be looking for during the search." *Id.,* 344 F.3d at 1018. The search warrant in this case does not contain the type of "catch-all" provision disapproved by the court in *Bridges.*

warrant did not state what criminal activity was being investigated by the IRS and, thus, there was nothing in the warrant to guide the government's agents in seizing property under the broad categories of items to be seized. *Bridges* concluded that "[s]uch warrants are suspect because "[n]othing on the face of the warrant tells the searching officers for what crime the search is being undertaken.' *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992)." *Id.,* at 1018.

In *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), the defendants were indicted and convicted for corporate tax evasion, individual tax fraud and profit skimming. The affidavit in that case alleged that the business maintained multiple sets of accounting records, paid falsified invoices submitted by phony corporations, and paid employees under the table all for the purpose of defrauding the IRS. The search warrant contained a list of 14 categories of documents to be seized. As in *Bridges*, many, but not all, of the list of documents consisted of nothing more than generalized descriptions of various types of business records. The court characterized this list as authorizing "the seizure of virtually every document and computer file at HK Video." *Id.,* at 427. The court stated:

> To the extent it provided any guidance to the officers executing the warrant, the warrant apparently sought to describe every document on the premises and direct that everything be seized. The government emphasizes that the warrant outlined fourteen separate categories of business records. However, the warrant contained no limitation on which documents within each category could be seized or suggested how they related to criminal activity. By failing to describe with any particularity the items to be seized, the warrant is indistinguishable from the general warrants repeatedly held by this court to be unconstitutional. *E.g., Center Art Galleries – Hawaii, Inc. v. United States*, 875 F.2d 747, 750 (1989); *United States v. Stubbs*, 873 F.2d 210, 211, (9th Cir. 1989) (warrant invalid "because of the complete lack of any standard by which an executing officer could determine what to seize.")

The court in *Kow* held that the government could have made the warrant more particular by specifying the suspected criminal conduct. Additionally, the government did not limit the scope of the seizure to a time frame in which the suspected criminal activity occurred even though the affidavit indicated that the criminal activity began relatively late in the business's existence. *Id.*

Bridges, Kow and the other Ninth Circuit decisions discussed therein do not require that every search warrant describe the alleged criminal activity *in addition to particularly describing the things to be seized*. Such a reading would be inconsistent with the language of the Fourth Amendment as recently construed by the Supreme Court in *United States v. Grubbs*, 126 S.Ct.1494, 1500,74 USLW

4173 (2006), in which the Court states:

> The Fourth Amendment, however, does not set forth some general "particularity requirement." It specifies only two matters that must be 'particularly describ[ed]" in the warrant: "the place to be searched" and "the persons or things to be seized." We have previously rejected efforts to expand the scope of this provision to embrace unenumerated matters.

Consistent with the Fourth Amendment and the Supreme Court's decision in *Grubbs, Bridges* states that "[t]he Fourth Amendment requires search warrants to state with reasonable particularity what items are being targeted for search *or, alternatively,* what criminal activity is suspected of having been perpetrated." (Emphasis added.). 344 F.3d at 1016-17. Therefore, if a warrant particularly describes the items to be seized within the scope of the probable cause set forth in the affidavit, the warrant does not also have to describe the criminal activity under investigation. As the Supreme Court has stated, however, there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. *United States v. Washington*, 797 F.2d 1461,1468 (1984), citing *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). Where the warrant lists generic categories of business records, some but not all of which relate to the criminal activity described in the affidavit, the warrant should also describe the criminal activity in order to provide particularity to the description of the records to be seized.

In other cases, the court has found a warrant unconstitutionally overbroad where it did not limit the scope of items to be seized to the evidence that the government knew it was seeking and had probable cause to seize. In *Center Art Galleries – Hawaii, Inc. v. United States*, 875 F.2d 747, 750 (1989), the affidavit provided probable cause that the defendant was engaged in the sale of forged Salvador Dali artwork. The search warrants, however, authorized the seizure of a lengthy list of business records and equipment that was not restricted to the allegedly forged artwork. Because the government had the means to identify and limit the warrants to the accounts that might have involved Dali artwork, the court held that the warrant violated the Fourth Amendment. *VonderAhe v. Howland*, 508 F.2d 364 (9th Cir. 1974) and *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982), also involved cases in the government's affidavit demonstrated that it had fairly specific knowledge of the records it was seeking and for which probable cause existed, but the warrants nevertheless unlawfully authorized

the seizure of a broad range of defendants' business records beyond the probable cause set forth in the affidavit.

Based on these and other cases, Defendants argue that the search warrant in this case violates the particularity requirement of the Fourth Amendment. Defendants point out that the search warrant did not provide any description of the suspected criminal activity to which the list of items to be seized from SDI's offices related. Nor did the search warrant make any reference to the criminal statutes that SDI or Todd Kaplan were suspected of violating – although such reference would not have been sufficient to satisfy the Fourth Amendment. *United States v. Spilotro, supra*. The warrant also did not limit the seizure to SDI's records, and it contained no time restrictions regarding the records that could be seized. Because of these deficiencies, Defendants argue that the warrant in this case, like those in the foregoing cases, was a general warrant that provided no reasonable guidance to the Government's agents in conducting the search, but instead permitted them to seize virtually all of SDI's business records without regard to whether they related to the alleged fraudulent scheme or tax evasion allegations.

The Government argues that the warrant in this case is distinguishable from the warrants held invalid in *Bridges, Kow,* and *Center Art Galleries.* Because of the broad scope of fraudulent activity described in Agent Bomstad's affidavit, the Government argues that it was reasonable to provide fairly broad descriptions of the types of documents to be seized. The Government argues that the categories of records to be seized were sufficiently descriptive of all records in a given category for which probable cause existed to justify seizure. Relying on *Andresen v. Maryland, supra,* the Government argues that a broad-based fraudulent conspiracy such as that described in the affidavit could only be shown by seizing and reviewing a broad range of SDI's records relating to its sleep studies business in order piece together the many bits of evidence proving the scheme.

In addition to *Andresen*, the Government cites other Ninth Circuit decisions, including *United States v. Hayes*, 794 F.2d 1348, 1355 (9th Cir. 1986) and *United States v. Meek*, 366 F.3d 705, 715 (9th Cir. 2004), in support of its position. In *United States v. Hayes*, the government obtained search warrants to search a physician's office based on probable cause to believe that he was illegally prescribing and distributing controlled substances to many patients. The warrant authorized the

government to seize controlled substances and documents regarding the purchasing, dispensing and prescribing of controlled substances, including, but not limited to, records contained in patient charts and all relevant records required to be maintained under specified federal and state regulations and statutes, patient logs, appointment books and other records or ledgers reflecting distribution of controlled substances and correspondence concerning the procuring, transferring, administering, prescribing or dispensing of controlled substances by the physician.

Hayes stated that the fact that there were over 10,000 patient files did not detract from the issuing magistrate's initial finding of probable cause. *Id.* The court stated that "[t]he number of files that could be scrutinized is not determinative. The search and seizure of large quantities of material is justified if the material is within the scope of the probable cause underlying the warrant. [Citations omitted.]" 794 F.2d at 1355. The court also rejected the defendant's assertion that the warrant failed to provide standards for the officers to distinguish between those files the officers could seize and those they could not. The warrant limited the officers' seizure to documents dealing with the distribution of controlled substances and did not permit the seizure of any documents unrelated to controlled substances. Therefore, the warrant was sufficiently particular in only authorizing the seizure of documents within the scope of the probable cause set forth in the affidavit. The court also rejected the defendant's argument that the warrants should have been limited to the 58 cases of potential violations described in the affidavit. The affidavit provided probable cause to believe that the defendant was engaged in more pervasive violations and, therefore, also justified the seizure of additional patient records relating to the prescription or distribution of controlled substances.[9]

Similarly, in *United States v. Meek*, 366 F.3d 705, 715 (9th Cir. 2004), the court held that a search warrant authorizing the search of defendant's house and automobile for material relating to child pornography satisfied the particularity requirement of the Fourth Amendment. In so holding, the court stated:

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[9]The dissenting judge disagreed with the majority opinion precisely on this point, arguing that under cases such as *Cardwell* and *VanderAhe,* there was no probable cause to support the search of all the patient files to look for evidence of the illegal prescription or distribution of controlled substances and the warrants, therefore, constituted "general" warrants.

> The warrant also provided the officers with objective guidance in their search because all items listed in the warrant were limited to materials related to "sexual exploitation of a child." Unlike the circumstances before us in *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), the warrant here did not authorize the seizure of virtually every document and computer file without indicating how the items related to the suspected crime.

Meek states that "[t]he proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation." 366 F.3d at 716. The Government argues that this is the standard the Court should apply to the warrant in this case and uphold it on that basis. *Meek* also held, however, that the government met the requirement because the warrant specifically referred to items relating to sexual exploitation of children, describing those items with as much precision as possible. *See also, United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997), upholding a warrant authorizing the seizure of a computer system based on probable cause that it contained evidence of child pornography.

The flaw in the Government's position is that, unlike *Hayes* and *Meek*, the search warrant in this case provided absolutely no description of the suspected criminal activity to which the documents to be seized related. If the search warrant had contained such a description, the 24 categories of items or records listed in Attachment "B" could probably be justified as only authorizing seizure of documents relating to some aspect of the alleged fraudulent scheme or SDI's and Todd Kaplan's alleged tax evasion. Because no description of the criminal activity was set forth in the warrant, however, it provided no direction to the Government agents regarding the purpose of the search or what types of records in each category were within the scope of the alleged criminal activity described in Agent Bomstad's affidavit. It would not have been difficult for the Government to have limited the scope of the search warrant by setting forth a sufficient description of the criminal activity, as was done in *Hayes* and *Meek, supra.* The Court, therefore, cannot agree with the Government's position that it was not reasonably possible at the time the warrant was issued to have described the documents to be seized with more particularity and avoid the overbreadth of this warrant.

Nevertheless, some of the categories of documents listed in Attachment "B" are sufficiently specific because the Government had probable cause to seize all records within those categories as evidence of the fraudulent health care insurance scheme or tax evasion crimes described in Agent

Bomstad's affidavit. The following categories of documents listed in Attachment "B" are of this nature:

1. Patient lists.

3. lists of referring physicians, both active and inactive.

5. contracts or "purchase service agreements" with referring physicians.

6. contracts and agreements with cardiac diagnostic companies.

14. patient records including patient questionnaires, sleep study referrals, results of cardiac assessment tests, results of sleep studies, and sleep study reports.

15. raw sleep study data.

17. signature stamps for Dr. Awerbuch, Dr. Sprau and any other physician signature stamps.

16. Documents relating to all state and federal income tax returns including personal, corporate, trust, estate and partnership, and information relating to the preparation of those returns for the following:
    a) Todd Stuart Kaplan
    b) Denise Kaplan
    c) SDI

18. computer zip discs containing sleep study data.

20. employee training materials regarding the health service coordinator program, cardiac risk assessment program, and/or physician practice enhancement program.

21. presentations and/or training materials used to solicit patient referrals from physicians, and/or placement of HSCs in the physician's offices.

22. Holter monitor tapes containing cardiac monitoring data.

23. Documents relating to material that provides instructions or examples concerning the operation of the computer system, computer software, and/or related devices.

Government's Exhibit 1-A.

These categories are not simply generic descriptions of business records. They describe with a reasonable degree of specificity the records sought by the Government based on the information set forth in Agent Bomstad's affidavit. The Government had probable cause to believe that SDI was engaging in a fraudulent scheme with referring physicians and the cardiac diagnostic companies to refer patients for unnecessary sleep studies and unnecessary and improperly performed cardiac risk assessment studies and to improperly bill Medicare and private insurers for those services. Except for item 16 which was relevant to the tax evasion allegations, each of the foregoing categories of

documents reasonably related to evidence that the Government was seeking to prove that fraudulent scheme. There is no evidence that SDI was engaged in any other business activity, separate and apart from sleep study services. Therefore, records relating to patient lists, lists of referring physicians, contracts with referring physicians and cardiac diagnostic companies all appear to be within the scope of documents that the Government was entitled to seize pursuant to the probable cause established in the affidavit. It was, therefore, unnecessary for the warrant to describe the suspected criminal activity in regard to the above items because the Government had probable cause to seize all documents within the listed categories. Because the Government had information that the foregoing records were likely or possibly kept on computers or in computer data bases, it was also reasonable for the Government to seize documents regarding the operation of the computer system in order to search for records within the scope of the warrant.

The search warrant, however, also did not contain any time limitations or restrictions regarding the seizure of the foregoing records. The Ninth Circuit, in *Center Art Galleries* and *Kow,* criticized the absence of time limitations in the warrants regarding the generically described documents in those cases. Unlike those cases, however, there is no evidence that the Government had knowledge that the alleged fraudulent scheme was limited to a distinct part of SDI's business or that the fraudulent activity had begun or was limited to some discrete time period in SDI's existence. Rather, the information set forth in the affidavit indicated that the alleged fraudulent practices were a widespread part of SDI's business. The information set forth in the affidavit was also sufficient to support an inference or conclusion that the alleged fraudulent practices had been ongoing since the inception of SDI's business. Moreover, the foregoing categories of documents were not over broad, generic descriptions of general business documents. Although the Government could have included a time period in the warrant to limit the seizure to the period beginning from SDI's formation, the Court finds that such a limitation was not reasonably required in regard to the foregoing categories of documents.

Some categories of documents listed in Attachment "B" fall near the borderline between being reasonably related to the health care fraud scheme and being too general in their description to justify seizure of all documents falling within the specified category. These categories include the following:

2. Documents relating to billing procedures, billing manuals, and billing materials.

4. Documents relating to billing records and records of payments received.

8. Documents relating to correspondence with Medicare intermediaries and private insurance companies.

19. Documents relating to mailing and shipping records between physicians and SDI.

Reasonably, some additional description could and should have been provided regarding these categories to limit them to the alleged fraudulent scheme under investigation. These categories are borderline in acceptability because SDI's entire business appears to have been the conducting of sleep studies, and the affidavit supported the conclusion that SDI's allegedly fraudulent conduct was routine. SDI's billing procedures, manuals and materials, and its billing records and records of payments received from insurers for sleep studies all potentially related to the alleged fraudulent scheme. Likewise, correspondence with Medicare intermediaries and private insurance companies regarding billing and payments for sleep studies could arguably all relate to the fraudulent scheme. Again, it would not have taken very much for the Government to have included some limiting language in the warrant to ensure that the Government was only seeking billing and payment records and correspondence with Medicare and intermediaries and private insurers that related to the fraudulent scheme. The Government, however, did not do so. The Court, therefore, concludes that these categories of documents were overbroad and vague in their description of the items to be seized and were not adequately limited to seizure only of documents relating to the fraudulent scheme under investigation.

The remaining categories of records listed in Attachment "B" of the warrant were so generic and general in their description that, in the absence a description of the suspected criminal activity in the warrant and some reasonable time limitations, the Government's agents had no guidance in limiting the search and seizure to records relating to the alleged criminal activity. These categories are as follows:

7. Documents relating to non-privileged correspondence with consultants.

9. Documents relating to non-privileged internal memoranda and E-mail.

10. Documents relating to bank accounts, brokerage accounts, trusts.

11. Checking, savings, and money market account records, including check registers, cancelled checks, monthly statements, wire transfers, and cashier checks.

12. Documents relating to personnel and payroll records.

13. Documents relating to accounting records.

24. Rolodexes, address books and calendars.

It is certainly possible that within these categories of records the Government would expect to find evidence relating to the health care fraud conspiracy or evidence relating to the alleged tax evasion of Mr. and Mrs. Kaplan and SDI. It is not the general relevancy of the categories, but rather their vagueness and overbreadth that is the issue. The search warrant did not limit these general categories of business documents and financial records to the seizure of records relating to the criminal activity described in the affidavit. The search warrant, in fact, did not even limit the list of items to SDI's records or to records concerning Todd and Denise Kaplan. It is precisely these type of generic categories of business documents that the Ninth Circuit has held require that the warrant describe the criminal activity under investigation in order to provide some reasonable limitation and guidance on the scope of records to be seized.

The absence of any time restriction in regard to these categories of documents also contributes to the overbreadth of the warrant. It would not have been unreasonable or impossible for the Government to have included some date restrictions in the search warrant, such as restricting the search to records from when SDI began business or limiting the seizure of financial records to a time period corresponding to the period of the suspected tax evasion crimes. The combination of the lack of any description of the criminal activity, the failure to restrict these categories to SDI's or the Kaplans' records, and the lack of any time limitations regarding the scope of the documents to be seized, however, may have contributed to the seizure of records outside the scope of the alleged criminal activity set forth in the affidavit.

Defendants have presented evidence, through the testimony of Robert Kaplan and Jack Brunk, that the Government's agents seized business records regarding persons, companies, entities or subject matters that had no relevance to the criminal conduct under investigation. The Government has not specifically denied that such records were seized. It argues, however, that if such documents were seized, it was a result of the agents exceeding the scope of the search warrant and only the seizure of those records outside the scope of the warrant should be suppressed. While the seizure of such

documents could arguably be attributed to an agent's mistake or carelessness in executing the warrant, it is also reasonable to conclude that such records were seized because the list of items in the warrant contained no descriptions of the criminal activity or reasonably descriptive limitations on what documents were subject to seizure. In regard to these categories, the warrant provided the agents with no reasonable guidance as to what documents within these categories related to the criminal activity under investigation.

The Court, therefore, finds that items 2, 4, 7, 8, 9, 10, 11, 12, 13, 19 and 24 in Attachment "B" to the search warrant failed to particularly describe the items to be seized and were overly broad and general in their scope.

3. The Affidavit Was Not Incorporated Into The Search Warrant And Therefore Does Not Provide a Basis for Curing the Particularity Defects In the Search Warrant.

Having concluded that several categories of documents listed in the search warrant were overbroad and failed to described the items to be seized with sufficient particularity, the next issue is whether the deficiencies in these items can be cured by the Government's reliance on Agent Bomstad's affidavit. The Defendants argue that the Government cannot rely on Agent Bomstad's affidavit to cure the overbreadth in the search warrant because the affidavit was not expressly incorporated into the search warrant.

The Ninth Circuit requires two things in order for the Government to rely on the affidavit to provide the particularity missing in the search warrant. First, the affidavit must be expressly incorporated into and made a part of the warrant through use of suitable words of reference. Second, the affidavit must be present during the execution of the warrant so that it can be referred to by the agents in guiding their seizure of documents or things. *United States v. Towne*, 997 F.2d 537, 545 (9th Cir. 1993), *citing In re Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F.2d 1317, 1319 (9th Cir. 1981). *Towne* explained that "when the affidavit is incorporated by reference into the warrant and limits the generality of the description in the warrant, the discretion of the officers executing the warrant is limited. When the affidavit accompanies the warrant, the person being searched has notice of the specific items the officer is entitled to seize." 997 F.2d at 545. The court in *Towne* also reviewed its prior decisions regarding whether the affidavit must also be physically attached to the warrant.

Although noting that prior decisions were vague or confusing on this point, *Towne* concluded that physical attachment is not required so long as the affidavit is incorporated into the warrant and the affidavit is present at the time and place that the warrant is executed. In so holding, the court stated that "[w]e simply do not believe that the Constitution requires us to draw the line between lawful and unlawful searches according to the presence or absence of a staple, a paper clip, a bit of tape, or a rubber band." *Id.*

Although the form Search Warrant on Affidavit, *Government's Exhibit 1-A,* refers to the affidavit, it does not contain express language incorporating the affidavit into the warrant. It is noteworthy that the form Affidavit for Search Warrant, *Government's Exhibit 1-B,* expressly stated that Agent Bomstad's affidavit was incorporated into the form affidavit. If the Government had also desired to incorporate the affidavit into the search warrant and make it a part thereof, it could and should have used similar language of incorporation. As *Towne* and later decisions make clear, such incorporation is a rigid requirement in order for the Government to rely on the provisions of the affidavit to supply the particularity missing from the warrant. *Towne, supra; United States v. Bridges*, 344 F.3d at 1018; *United States v. Kow*, 58 F.3d at 429 n.3.

Agent Bomstad testified that the magistrate judge requested that changes be made to her affidavit regarding the handling of confidential patient files and those changes were made. The magistrate judge also made a handwritten addition on attachment B of the search warrant, stating:

> 8. Patient confidential medical information shall be handled in accordance with the procedures set forth in the Affidavit.

Although the language added to Attachment "B" by the magistrate judge directs the Government's agents to comply with the provisions of the affidavit in handling patient confidential medical information, a reasonable person would not conclude from this addition that the entire affidavit was incorporated into the search warrant. The Court, therefore, finds that this addition was not sufficient to satisfy the incorporation requirement.

Defendants also argue that the Government cannot rely on the affidavit to cure the defects in the warrant because the affidavit was sealed by order of the court, and Defendants were not provided with a copy of the affidavit at the time of the search. The Ninth Circuit has repeatedly stated that in addition

to limiting the discretion of the officers conducting the search, the particularity requirement also notifies the individual whose property is being searched of the lawful authority of the executing officer, his need to search, and the limits of his power to search. *See e.g., United States v. Grubb*, 377 F.3d 1072 (9th Cir. 2004); *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002). The court has also held that the incorporation rule also ensures that the person subject to the search is notified of limitations imposed on the officers' seizure of documents and things pursuant to the affidavit. In furtherance of this notice purpose, the Ninth Circuit also interpreted Rule 41(d) of the Federal Rules of Criminal Procedure as requiring that the warrant must be presented to the person at the outset of the search. *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999); *United States v. Mann*, 389 F.3d 869, 875 n.1 (9th Cir. 2004).

The Supreme Court's decision in *United States v. Grubbs*, 126 S.Ct.1494, 1501,74 USLW 4173 (2006), however, clearly rejects the Ninth Circuit's rationale that the particularity requirement serves the interest of the individual in monitoring or policing the officer's conduct in executing the warrant or that Rule 41(d) requires that the person be provided with the warrant before the search commences. *Grubbs* held that the triggering condition for an anticipatory search warrant does not have to be described in the warrant because it only establishes the probable cause basis upon which the warrant will be executed. The Court also rejected the defendant's argument that because the triggering condition was not set forth in the warrant, he had no ability to monitor the legality of the search. The Court noted that this argument presumes that the executing officer must present the warrant to the person before the search commences. The Court stated:

> In fact, however, neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure imposes such a requirement. See *Groh v. Ramirez*, 540 U.S. 551, 562, n.5, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). "The absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed until the search has ended, is ... evidence that the requirement of particular description does not protect an interest in monitoring searches." *United States v. Stefonek*, 179 F.3d 1030, 1034 (C.A. 7 1999) (citations omitted.) The Constitution protects property owners not by giving them license to engage the police in a debate over the basis of the warrant, but by interposing, *ex ante*, the "deliberate, impartial judgment of a judicial officer ... between the citizen and the police." *Wong Sun v. United States,* 371 U.S. 471, 481-82, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.

While *Grubbs* may be distinguishable where an incorporated affidavit is used to provide particularity to the description of the items to be seized, it is unnecessary for the Court to decide whether the officers were required to provide Defendants with a copy of the affidavit at the time of the search. Because Agent Bomstad's affidavit was not incorporated into the search warrant, the Government cannot rely on it to cure the alleged particularity defects in the warrant.

4. Permeated-With-Fraud Exception to Particularity Requirement.

Defendants argue that the Government cannot rely on the "permeated-with-fraud" exception to the particularity requirement under which a warrant may authorize the seizure of all of a business's records where the affidavit demonstrates that it is permeated with fraud or that the records evidencing the fraud are inseparable from the business's other records. *United States v. The Offices Known as 50 State Distributing Co.*, 708 F.2d 1371 (9th Cir. 1983).

50 State involved a "boiler room" sales operation through which the defendant falsely advised prospective customers that they had won a free prize which they could only collect by purchasing "high quality" merchandise that turned out to be shoddy. The search warrant generally authorized the seizure of all of defendant's business records. In upholding the warrant, the court held that it did not violate the particularity requirement because:

> The warrant left the executing officers with no discretion. While the seizure was extraordinarily broad, and in that sense "general", under the particular facts of this case the scope of the warrant was justified. It was not possible through a more particular description to segregate those business records that would be evidence of fraud from those that would not, for the reason that there was probable cause to believe that fraud permeated the entire business operation of 50 State. *Id.,* 708 F.2d at 1374.

Cases since *50 State* have limited the exception to businesses which are essentially sham enterprises that have little or no legitimate business purpose. *United States v. Rude*, 88 F.3d 1538, 1551 (9th Cir.1996) (fraudulent investment scheme); *United States v. Smith*, 424 F.3d 992, 1006 (2005) (fraudulent tax avoidance and investment scheme). The court has refused, however, to apply the exception where the business appears to have some legitimate purpose even though it is allegedly engaging in fraudulent criminal activity. *Center Art Galleries – Hawaii, Inc. v. United States*, 875 F.2d 747, 751 (9th Cir. 1989) (otherwise legitimate art gallery business allegedly engaged in the sale of

forged Salvador Dali paintings); *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995) (arguably legitimate video distribution business engaged in fraudulent concealment of revenues to avoid payment of taxes); *Solid State Devices, Inc. v. United States*, 130 F.3d 853 (9th Cir. 1997) (semiconductor supplier allegedly engaged in fraudulent sale of defective devices). In *Solid State Devices*, the court distinguished *50 State* as follows:

> Where a business appears, as SSDI does here, to be engaged in some legitimate activity, this Court has required a more substantial showing of pervasive fraud than that provided by the Government in the instant case. *See, e.g., United States v. Hayes,* 794 F.2d 1348, 1356 (9th Cir.1986) (search of all of physician's patient records justified by complaints of illegal prescriptions to very large number of patients).

Thus, in *Center Art Galleries – Hawaii, Inc. v. United States*, *supra,* the court rejected the application of the "permeated-with-fraud" exception because only approximately twenty percent of defendant's business was related to the alleged sale of forged Dali artwork. The affidavit also did not aver that evidence of defendant's fraud was inseparable from other documents or that defendant was permeated with fraud. In *United States v. Kow*, *supra*, the court held that the affidavit did not support the application of the "permeated-with-fraud" exception, noting that the government's affidavit conceded that the business was "a legitimate business and serves a need in the communities where it is located." There was also no allegation that the business was so permeated with fraud that the government could not reasonably segregate the business's documents on the basis of whether they were likely to evidence criminal activity.

By contrast in *United States v. Rude* and *United States v. Smith,* the affidavits established that the businesses were completely sham enterprises which were set up to bilk their customers or clients. In upholding the application of the exception, *Rude* noted that "[t]he affidavit supporting the search warrant validates the lower court's finding, as it is clear therefrom that NPI's central purpose was to serve as a front for defrauding prime bank note investors." 88 F.3d at 1551. In uphold the warrant in *Smith,* the court also stated:

> The magistrate judge reviewed Agent O'Keeffe's affidavit in support of the application for the search warrant, which detailed her comprehensive investigation of the UBO scheme. The affidavit concludes that the "entirety of the business operated by Bates, Smith and their associates are criminal in nature." Agent O'Keeffe's affidavit provided ample probable

> cause to meet the "permeated-with-fraud" exception to the particularity and breadth requirements.

424 F.3d at 1006.

The Ninth Circuit's decisions regarding the "permeated-with-fraud" exception indicate that the exception is narrowly and strictly applied. *Bridges* also states that the affidavit must clearly aver that the business is permeated with fraud or the records evidencing the fraud are inseparable from the other business records. The court stated:

> In *Rude*, we explained that such a seizure may be justified if the Government's supporting affidavit made it clear that the target's "central purpose was to serve as a front for defrauding" investors. *See Rude*, 88 F.3d at 1551. This, however, is not such a case. Here , the IRS did not allege in its application that ATC's operations were permeated with fraud. *See id.*, at 428 (citing *Center Art*, 875 F2d at 751 ("permeated with fraud" doctrine not applicable where supporting affidavit "did not aver that evidence of [the alleged] fraud was inseparable from other [business] documents or that [the business] was permeated with fraud.") Similarly, Agent Rodriguez's Affidavit does not make it sufficiently clear that ATC's operations were entirely fraudulent in nature. Specifically, it is not clear to us whether the Government knew at the time it was making the application that ATC's operations were permeated with fraud. If that was the case, the Government should have made this clear to the district court, so that the district court could examine the Government's evidence with greater depth and fashion a sufficiently tailored warrant consistent with the principles of the Fourth Amendment. In this case, however, there is insufficient evidence in the record to justify the Government's claim ex post facto.

In this case, Agent Bomstad's affidavit did not expressly assert that SDI was "permeated with fraud." Nor did the affidavit expressly assert that SDI's business records evidencing the fraud were inseparable from other business records. The affidavit describes the nature of the records that the Government sought to seize as follows:

> The records maintained by SDI will help show that HRV, SAEGG, and nerve conduction studies of the upper extremities are not rendered, and for some of the patients, the patient referral records are expected to show these tests were not ordered by the physician. Financial records will provide further evidence of payments from the CDCs to SDI. SDI is likely to have contracts, memoranda, E-mail, and/or other documents explaining the relationship between SDI and the CDCs and the reasons for the payments. *Affidavit,* ¶13.b, pp. 8-9.[10]

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[10]Had similar language been included in the search warrant, it would have provided some basis for finding that the warrant particularly described the financial records, memoranda, E-mail and other

SDI's business involved a legitimate type of medical service business, providing sleep studies, which Defendants allegedly operated in a fraudulent manner to improperly collect insurance benefits from Medicare and private insurers. If the affidavit merely alleged that SDI referred many patients for unnecessary sleep studies, then, as Defendants argue, it would clearly not be sufficient to show that SDI was "permeated with fraud" because the majority of patients were legitimate candidates for sleep studies. Agent Bomstad's affidavit, however, makes a number of additional allegations regarding SDI's allegedly fraudulent practices regarding the sleep studies and associated cardiac risk assessments. These include allegations that the computer monitoring equipment did not function or was not connected properly, many of the sleep study reports were of poor quality, that the sleep study reports were prepared by persons not qualified to do so, that the SDI physicians did not actually review the sleep study reports and that their signatures were instead affixed with signature stamps. Agent Bomstad's affidavit also alleges that SDI, in conjunction with the referring physicians and cardiac diagnostic companies (CDC's), arranged for unnecessary and improperly performed cardiac risk assessment tests, and that SDI and its co-conspirators double billed for these studies by manipulating the CPT billing codes and billing procedures. The affidavit alleges that as part of this fraudulent scheme, SDI advised the referring physicians how to improperly bill for their alleged services and that the cardiac diagnostic companies paid "kickbacks" to SDI. The information set forth in Agent Bomstad's affidavit suggests that these alleged practices were a routine and widespread part of SDI's and the co-conspirators' business practices.

The information set forth in Agent Bomstad's affidavit, therefore, supports the conclusion that SDI's alleged fraudulent conduct was more pervasive than was demonstrated by the affidavits in *Center Art Galleries* and *Solid State Devices*, *supra.* The alleged fraudulent activity was also arguably more pervasive than that described in *United States v. Kow.* It cannot be said, however, that the alleged fraud here was any more pervasive than was set forth in the affidavit in *Bridges.* Nor did the alleged fraud rise to the level of demonstrating that SDI was nothing more than a mere "front" for illegal activity or a totally sham enterprise such as existed in *50 State, Rude* or *Smith, supra*.

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documents to be seized.

The Court finds that the decision in *United States v. Bridges* is controlling because Agent Bomstad's affidavit did not contain express averments that SDI was permeated with fraud or that its entire business was fraudulent. Had it done so, the magistrate judge may have had the basis for analyzing the affidavit and authorizing the broad search warrant under the "permeated-with fraud" exception. Because the affidavit did not contain the express averments that *Bridges* states are essential, however, the Court concludes that the "permeated-with-fraud" exception does not apply in this case.

5. Whether The Valid Provisions of the Warrant May Be Severed from the Overbroad Provisions.

Because the Court finds that portions of the search warrant in this case are overbroad and violate the particularity requirement of the Fourth Amendment, the Court must determine whether the valid portions of the warrant can be severed from the invalid portions, and the warrant upheld as to the seizure of the properly described items.

In *United States v. Sears*, 411 F.3d 1124, 1128 (9th Cir. 2005), the court states that the "'prime purpose of the exclusionary rule is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.' *Illinois v. Krull*, 480 U.S. 340, 347, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)." Evidence should be suppressed only if the officer had knowledge or may properly be charged with knowledge that the search was unconstitutional. *Id., citing Krull, supra,* and *United States v. Leon*, 468 U.S. 897, 918, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). *Sears* states that partial suppression is proper under the Ninth Circuit's doctrine of severance which allows a court to strike from a warrant those portions that are invalid and preserve those portions that satisfy the Fourth Amendment. *Id., citing United States v. Gomez-Soto,* 723 F.2d 649, 654 (9th Cir. 1984); *United States v. Washington*, 797 F.3d 1461, 1473 (9th Cir. 1984).

Sears states that "total suppression, on the other hand, is appropriate when a warrant is wholly lacking in particularity." *Id.* The court has used total suppression as a remedy in cases involving warrants with serious particularity defects such as where the warrant failed to specify any type of criminal activity suspected or "any type of evidence sought 'lacked the requisite -- indeed, any -- particularity .'" *Sears, citing United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997). *Sears* further states that "[t]he doctrine of severance requires that "identifiable portions of the warrant be sufficiently

specific and particular to support severance.' *United States v. Spilotro,* 800 F.2d 959, 967 (9th Cir. 1986)."

In *Spilotro*, the court refused to apply severance because none of the items in the warrant were set forth in textually severable portions. In *Cardwell,* the court also held that severance was improper where even the most specific descriptions in the warrant, "checks, journals, ledgers, etc." were fairly general. In determining whether severance is appropriate, the court takes into account the relative size of the valid and invalid portions of the warrant. Thus, in *Spilotro,* the court refused to sever and permit seizure of items that "were only a relatively insignificant part of the sweeping search for evidence of any violation of thirteen enumerated statutes." *Sears,* at 1130. In *Kow, supra,* 58 F.3d at 428, the court also refused to grant partial severance where only one of the fourteen categories in the warrant was arguably not overbroad, holding that "severance is not available when the valid portion of the warrant is 'a relatively insignificant part' of an otherwise invalid search."

By contrast, the court permitted severance in *Gomez-Soto*, 723 F.2d at 654, where only one of thirteen descriptions was insufficiently particularized, and also permitted severance in *In re Grand Jury Subpoenas Dated December 10, 1987,* 926 F.2d 847, 858 (9th Cir. 1991), where documents of the persons or entities for which there was probable cause constituted the focus and vast majority of the files searched and two of the three categories of documents to be seized were described with sufficient particularity. *Sears,* at 1131. In *VonderAhe, supra,* 508 F.2d at 372, the court also granted severance and upheld the warrant as to the seizure of those records described in the warrant that were particularly described and for which probable cause existed. Only a portion of the warrant in *VonderAhe* was valid, and the facts indicated that the government obtained a broad and general warrant which it used to seize all of defendant's business records. It is questionable whether the result in *VonderAhe* would have been the same if it had been decided under the standards for severance set forth in the later cases discussed in *Sears.*

In contrast to the cases discussed above, the list of valid and invalid items in the search warrant in this case do not fall into either extreme. Numerically, the number of items that were described with sufficient particularity is roughly equal to the number which were not. The Court, however, does not view Ninth Circuit's doctrine of severance to be simply a matter of arithmetic by which the court adds

up the number of valid items versus the invalid ones. A warrant, for example, might list several items which satisfy the particularity requirement, but which contains an equal or lesser number of provisions which authorize an overbroad and general search of the defendant's records. In such a case, the court might still conclude that the valid items were only a relatively insignificant part of the sweeping search and seizure of records which were not particularly described.

As evidenced by Agent Bomstad's affidavit, a principal, if not the primary, purpose of the search and seizure was to seize records regarding SDI patient lists, lists of referring physicians, contracts or "purchase service agreements" with referring physicians, contracts and agreements with cardiac diagnostic companies, patient records regarding the sleep study questionnaires, sleep study referrals, results of cardiac assessment tests and sleep study reports, together with other documents and data pertaining thereto, which the Court has found were sufficiently described in the warrant. In view of the allegations set forth in Agent Bomstad's affidavit, the Court cannot conclude that these items were only a relatively insignificant part of the warrant. Rather, they may be properly characterized as a principal portion of the evidence that the Government was seeking based on the information that had been provided to it by the persons it interviewed, and also based on its review of insurance claims records submitted to insurers by SDI.

Although the Government also seized a voluminous amount of other documents falling within the overbroad categories of the search warrant, as evidenced by its inventories, *Government's Exhibits 1-F* and *1-G,* the Court finds that the deterrent effect of partial suppression is appropriate in this case. In this regard, suppression of the overbroad seizure of documents will result in suppression of improperly seized evidence regarding the alleged fraudulent scheme which might have been properly seized by the Government had it obtained a search warrant describing the items to be seized with sufficient particularity and avoided the penalties that are appropriately prescribed for a general warrant. Suppression of the valid portions of the warrant is, therefore, not necessary in order to sufficiently deter the Government's violation of the Fourth Amendment.

The Court, therefore, concludes that severance is appropriate in this case as to category numbers 3, 5, 6, 14, 15, 16, 17, 18, 20, 21, 22 and 23 in Attachment "B" to the search warrant and that the seizure of documents in these categories should not be suppressed.

6. Good Faith Exception.

The Government argues that the documents seized pursuant to the allegedly invalid warrant should not be suppressed because the Government's agents acted in the objective good faith belief that the warrant was valid. *United States v. Leon*, 468 U.S. 897, 921 (984) and *Massachusetts v. Sheppard*, 468 U.S. 981, 987-988 (1984). *Leon* adopted the "good faith exception" to the exclusionary rule under the Fourth Amendment, holding that evidence seized pursuant to an invalid search warrant will not be suppressed if the officers had an objective good faith belief that the warrant was valid. *Leon* applied this good faith exception where the affidavit in support of the warrant failed to establish probable cause, but where the officers had an objective good faith belief that probable cause existed and relied on the determination of the issuing judge that the warrant was supported by probable cause. The Court also applied the good faith exception in *Sheppard* to a warrant which violated the particularity requirement.

Leon states that a warrant issued by a judge normally suffices to establish that a law enforcement officer has acted in good faith in conducting a search pursuant to the warrant. The Court identified four circumstances, however, in which the evidence may still be suppressed. *Leon,* 468 U.S. at 925. The only one of those circumstances relevant to Defendants' instant Motion to Suppress is whether the search warrant is so facially deficient in failing to particularly describe the things to be seized that the executing officers could not reasonably presume it to be valid.

The Government bears the burden of proving that its agents' reliance upon the warrant was objectively reasonable. *United States v. Michaelian*, 803 F.2d 1042, 1048 (9th Cir. 1986), *citing United States v. Hendricks*, 743 F.2d 653, 656 (9th Cir. 1984), *cert. denied,* 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 382 (1985). The determination of whether a warrant is so facially deficient that it cannot be relied on in good faith, in large measure, depends on the degree or extent of overbreadth in the warrant. *See United States v. Kow*, 58 F.3d 428-29; *Center Art Galleries v. United States*, 875 F.2d 752-53.

In *Michaelian*, the court held that the agents had an objective good faith belief that the warrant was valid. *Center Art Galleries*, however, distinguished *Michaelian* on the grounds that the warrant in that case limited the property to be seized to certain categories of documents within specified time periods. The warrant also restricted the search to evidence of specific crimes described in the texts of the warrant. The warrants in *Center Art Galleries*, however, contained no similar meaningful

restrictions on what could be seized and, therefore, were so overbroad that absent some exceptional circumstances, no agent could reasonably rely on them. *Center Art Galleries* also rejected the government's assertion that exceptional circumstances existed because the defendant's business was permeated with fraud. Having found that the government had made no showing that defendant's business was permeated with fraud, the court held that this assertion did not support a finding of good faith reliance on the warrant.

In *United States v. Kow,* the court held that the warrant had substantially the same deficiencies as those found in the warrant in *Center Art Galleries* – broad categories of documents to be seized, without description of the criminal activity or time period restrictions. *Kow,* therefore, also held that the warrant was so facially overbroad that no agent could rely in good faith on its validity. *See also United States v. Stubbs*, 873 F.2d 210 (9th Cir. 1989). *Kow*, therefore, rejected the government's assertion of good faith reliance on the basis that prior to the warrant's issuance, it had been reviewed by two Assistant United States Attorneys and had been approved by the issuing magistrate judge. The court held that these circumstances did not amount to "exceptional circumstances" which would justify reliance on a warrant that was so clearly facially deficient. Citing its earlier decision in *Center Art Galleries*, the court explained that when a warrant is facially overbroad, absent *specific assurances* from an impartial judge or magistrate that the defective warrant is valid despite its overbreadth, a reasonable reliance argument fails.

The warrant in this case did not contain any description of the alleged criminal activity relating the listed categories of documents. The warrant also did not contain any time limitations or even limit the scope of documents to be seized to those of SDI or related entities. The Court, therefore, concludes that as to items 2, 4, 7, 8, 9, 10, 11, 12, 13, 19, and 24, the warrant in this case was facially overbroad to the same extent as the warrants in *Kow* and *Center Art Galleries*. Therefore, the Government's agents could not have objectively in good faith believed that the warrant was valid as to those items. Although the facts in this case were arguably more supportive of a finding that SDI's business was "permeated-with-fraud," the Court has also concluded that the Government's affidavit failed to make the requisite showing to support application of the "permeated-with-fraud" exception. The Court, therefore, concludes that this circumstance also does not support the agents' good faith belief in the validity of the

warrant in this case.

Agent Bomstad's affidavit, which contained a substantially identical list of the items to be seized as set forth in Attachment "B" to the search warrant, was also reviewed by senior supervisory agents and the Assistant United States Attorneys in Nevada and the Central District of California before it was submitted to the magistrate judge. The magistrate judge reviewed the affidavit and search warrant for approximately two hours and asked Agent Bomstad questions about matters in the affidavit. The magistrate judge also requested that changes be made to the affidavit regarding the handling of confidential patient records and added a provision to Attachment "B" that patient records would be handled in accordance with the affidavit as modified. There is no evidence, however, that the magistrate judge gave Agent Bomstad specific assurances that the warrant was valid. Under *Kow* and *Center Art Galleries*, these circumstances are not sufficient to establish good faith reliance on validity of the facially overbroad portions of the warrant.

Agent Bomstad also testified that prior to the search, copies of the affidavit and search warrant were distributed and read by the agents participating in the search. She also testified that copies of the sealed affidavit were present during the search of SDI's premises and were available for reference by the agents. The reliability of Agent Bomstad's recollection that the affidavit was read by the agents during the pre-search meeting is questionable. The search plan, *Exhibit "DDD,"* stated that copies of the search warrant would be distributed to the agents during the pre-search meeting, but made no reference to distributing the affidavit to the agents or requiring them to read it.

In *United States v. Luk*, 859 F.2d 667 (9th Cir. 1988), the court upheld the seizure of documents pursuant to an overbroad search warrant under the good faith exception. In that case, the agent erroneously believed the affidavit had been incorporated into the search warrant. The affidavit, which contained more specific descriptions of the items to be seized, was present during the search and the agents relied on the more specific description of items contained in the affidavit and limited their seizure of documents accordingly. On these facts, the court upheld the seizure under the good faith exception. *Kow* and *Center Art Galleries*, however, distinguished *Luk* on the grounds that the warrant in *Luk* did not involve the same degree of overbreadth as the warrants before the court in those cases. In addition, there was no evidence that the agents actually relied on information in the affidavits to

restrict the scope of their seizures. *Kow* and *Center Art Galleries* also held that the affidavits in those cases contained identically overbroad descriptions of items to be seized as stated in the warrants. Thus, the affidavits were also overbroad.

No evidence was presented in this case that the Government's agents recognized the overbreadth of the warrant or that the agents in fact relied on the affidavit to restrict their seizures under the overbroad categories contained in the warrant. Although the affidavit in this case provided a description of the alleged criminal activity, some information pertaining to the relevant time periods of the criminal activity, and the purpose for which seizure of various types of documents was sought, the affidavit also set forth the identical list of items to be seized as was contained in Attachment "B" of the search warrant. The evidence presented to the Court, partly through the testimony of Defendants' witnesses, Robert Kaplan and Jack Brunk, but also as set forth in the Government's inventories, *Government's Exhibits 1-F* and *1-G*, supports the conclusion that the Government seized documents in these overbroad categories, including documents having no relevance to the persons, entities or subject matter under investigation. The Government did not present any evidence, as in *Luk,* that agents actually used the affidavit to limit the scope of their seizure of documents. The Court, therefore, finds that exceptional circumstances have not been shown in this case that would satisfy the Government's burden of proof that the good faith exception should apply to the overbroad categories of the warrant.

7. Validity of Robert Kaplan's and Todd Kaplan's Consents to Search Offsite Storage Facility.

Two issues are presented regarding the validity of the written consents to search SDI's offsite storage facility. The first issue is whether these consents were tainted by the illegality of the search warrant due to its overbreadth. The second issue is whether either or both Kaplans' consents were voluntary under the factual circumstances.

In *United States v. Chavez-Valenzuela*, 268 F.3d 719, 727 (9th Cir. 2001), the court held that under the Fourth Amendment, evidence obtained subsequent to an illegal investigation is tainted by the illegality and thus inadmissible, notwithstanding the defendant's consent, unless subsequent events have purged the taint. In determining whether the taint has been sufficiently purged, the court asks "'whether, granting establishment of the primary illegality, the evidence ... has been come at by means

sufficiently distinguishable to be purged of the primary taint.' *United States v. Millan*, 36 F.3d 886, 890 (9th Cir. 1994)." Elements to be considered include the temporal proximity between the illegality and the consent and the presence of intervening circumstances. The Court also takes into consideration the purpose and flagrancy of the official misconduct.

In *United States v. Hotal*, 143 F.3d 1223 (9th Cir. 1998), the government obtained an anticipatory search warrant to search defendant's residence for child pornography. After entering defendant's residence, the agents observed other incriminating evidence in "plain view" and also obtained a general consent from defendant to search his residence which resulted in the discovery and seizure of additional evidence. The court held that the warrant was invalid because it did not set forth the anticipatory condition for execution of the warrant. The court held that the additional evidence seized in "plain view" or pursuant to defendant's consent to search should also be suppressed because the officers gained entry into the premises through an unlawful search warrant. *Hotal* distinguished *United States v. Van Damme*, 48 F.3d 461 (9th Cir.1995), in which the court upheld the seizure of evidence that was observed in "plain view" even though the search warrant, itself, violated the Fourth Amendment by failing to describe the things to be seized with sufficient particularity. *Van Damme* stated that "[b]ecause we have concluded that probable cause was established for issuance of the warrant, and that it adequately described the places to be searched, our conclusion would not require suppression of contraband in plain view such as the marijuana in the greenhouses." 48 F.3d at 466-67.

In distinguishing *Van Damme,* the court in *Hotal* stated:

> The vice in the warrant in this case is different in nature from the *Van Damme* warrant's failure to identify the items to be seized. The warrant in this case failed to set forth the necessary conditions that permitted entry into Hotal's residence in the first place. Because the officer's entry into Hotal's residence pursuant to the unconstitutional search warrant was not lawful, the "plain view" doctrine does not apply to any of the evidence seized.

Hotal, supra, 143 F.3d at 1228, n. 7.

As previously discussed, the Supreme Court in *United States v. Grubbs, supra,* held that the anticipatory search condition is part of the probable cause determination validating the search and is not required to be set forth in the warrant. *Hotal* and the other decisions cited and discussed in Defendant's Motion, however, stand for the proposition that if the initial search or detention is entirely unlawful,

then all evidence obtained from a tainted consent to search must also be suppressed. In *United States v. Furrow*, 229 F.3d 805 (9th Cir. 2000) and *United States v. Jones*, 286 F.3d 1146 (9th Cir. 2002), the consents were invalid because the officers unlawfully conducted a warrantless search. In *State v. Poaipuni*, 49 P.3d 353, *reconsideration granted in part,* 53 P.2d 820 (Hawaii 2002), the search warrant was not supported by probable cause. Likewise, the consent to search in *Chavez-Valenzuela*, *supra,* was tainted by the officer's illegal detention and questioning of the defendant during a routine traffic stop. Thus, like *Hotal,* the consents to search arose from completely unlawful searches and seizures and, therefore, required the suppression of all evidence obtained as a result of the tainted consents.

Defendants' instant Motion to Suppress, however, is predicated on the invalidity of the search warrant because it failed to describe the things to be seized with sufficient particularity.[11] Defendant's Motion to Suppress does not allege that Agent Bomstad's affidavit failed to establish sufficient probable cause to obtain a warrant to search SDI's headquarters for evidence of criminal activity. The Court has determined that some of the categories of items described in the warrant were vague and overbroad and therefore in violation of the Fourth Amendment's particularity requirement. The Court has also determined, however, that other categories were described with sufficient particularity and that the seizure of those categories of documents should be upheld under the doctrine of severance.[12]

The Court finds that partial suppression of evidence seized from the storage facility, in the same manner as the evidence seized from SDI's headquarters, is the proper remedy in this case. The

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[11]The evidence presented at the hearing also showed that agents entered and videotaped the offices of Spectramed which was located on the second floor of the building. There is no evidence that the agents seized any documents from Spectramed's offices. Nor is there any evidence that the Kaplans were even aware that the agents entered Spectramed's office. Therefore, even though the agents did not have authority to search Spectramed's office, the Court finds that this unauthorized search is irrelevant to either the seizure of records from SDI's offices or to the consents obtained from the Kaplans. *See United States v. Furrow*, 229 F.3d 805 (9th Cir. 2000), in which the court held that defendant's consent to search was not tainted if he was unaware of the agent's prior illegal entry.

[12]The Court recognizes, of course, that Defendants have separately filed a Motion for a *Franks* Hearing. Should that Motion be granted, and should the Court subsequently determine that an accurately stated affidavit would not have supported a finding of probable cause to search SDI's premises, then all evidence seized pursuant to the warrant, as well as evidence seized pursuant to tainted consents to search, would be subject to suppression.

Government's agents had a lawful basis to search SDI's headquarters for the evidence that was sufficiently described in the search warrant and which this Court has determined should be upheld under the doctrine of severance. Thus, the officers did not unlawfully encounter the Kaplans as a result of a wholly improper entry. There were, however, no intervening circumstances that purged the taint of the partially invalid warrant. The Kaplans' consents were obtained during the midst of the search of SDI's headquarters and were premised on the search of the offsite storage facility for the same items listed in the warrant. The consents to search, therefore, are valid or invalid to the same extent that the search warrant, itself, is valid or invalid. The Court, therefore, finds that the consents to search the offsite storage facility were not tainted insofar as they authorized the Government to seize documents that were properly described in the search warrant. The consents were tainted and therefore invalid, however, as to the seizure of those categories of documents that the Court has found were overbroad and in violation of the Fourth Amendment.

The second issue is whether Robert Kaplan or Todd Kaplan voluntarily consented to the search of the offsite storage facility. It is the Government's burden to prove that the consent was freely and voluntarily given. Whether consent to search was voluntarily given is "to be determined from the totality of the circumstances." *United States v. Soriano*, 361 F.3d 494, 501 (9th Cir.2004), *citing Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The Ninth Circuit has identified five factors to be considered in determining the voluntariness of consent to a search: (1) whether the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was notified that he had the right not to consent; and (5) whether the defendant had been told a search warrant could be obtained. *Id., citing United States v. Jones,* 286 F.3d1146, 1152 (9th Cir. 2002); *United States v. Castillo*, 866 F.2d 1071, 1082 (9th Cir. 1989). *Soriano* states that no factor is determinative in the equation, and it is not necessary to check off all five factors. The factors are only guideposts and not a mechanized formula for resolving the voluntariness inquiry. The full richness of the encounter must be considered in determining whether there was voluntary consent.

Agent Bomstad testified that after the search commenced, she was informed by an SDI employee that many of the records the agents were seeking were located in an offsite storage facility.

She thereafter made contact with Robert Kaplan and requested consent to search the offsite storage facility to which he agreed. Ms. Bomstad or another agent then prepared a handwritten consent to search form which Robert Kaplan signed and which stated that he gave voluntary consent to search the offsite storage facility and to seize the records listed in the attachment. The form further stated that his consent was "given voluntary (sic) and knowingly." *Government's Exhibit 1-D.* Agent Bomstad testified that no threats or coercion was used to obtain Robert Kaplan's written consent. Agent Bomstad testified that after Defendant Todd Kaplan arrived at SDI headquarters, she also requested his permission to search the offsite storage facility, given his position as president of SDI. She testified that Todd Kaplan also voluntarily consented to the search of the offsite storage facility and signed a written consent to search. *Government's Exhibit 1-E.* Todd Kaplan also provided the agents with the address for the offsite storage facility and contacted the person in charge of the facility to allow the agents to gain access to the SDI records.

Robert Kaplan testified, however, that Agent Bomstad demanded that he consent to the search of the storage facility, called him a liar and indicated that if he did not consent, the agents would break into the storage facility. Robert Kaplan also testified that he saw the entry tools, including a crowbar, that the agents had brought with them. He asserted that he executed the consent to search because he feared that the agents would break into the offsite storage facility and damage the property if he did not consent. The fact that a person executes a written consent stating that he has voluntarily and knowingly consented to the search provides assurance that his consent was given voluntarily. Robert Kaplan acknowledged that he read the consent form before he signed it. His testimony that he executed the written consent to search form under duress lacks credibility. If the agents had, in fact, threatened to search the offsite storage facility regardless of whether Robert Kaplan gave his consent, then Mr. Kaplan could and should have refused to give written consent and have required the Government to seek a search warrant. Absent some credible evidence that Robert Kaplan did not understand the consent form or was misled as to its purpose, or corroborating evidence that he signed the consent form under duress, the Court finds that his consent was voluntarily given.

The fact that Defendant Todd Kaplan thereafter also executed a written consent casts further doubt on the credibility of Robert Kaplan's testimony and, in any event, provides an independent and

valid consent to search the storage facility. Robert Kaplan testified that he did not speak with his brother, Todd Kaplan, after the latter arrived at the SDI offices. There is no evidence that Todd Kaplan was aware of the alleged threats or coercion used to obtain Robert Kaplan's consent to search such that his consent was tainted by the measures allegedly used to obtain Robert Kaplan's consent. No testimony was presented that Todd Kaplan's written consent was obtained by threats or other forms of coercion.

Neither Robert Kaplan, Todd Kaplan nor any other person were arrested or placed in custody during the search of the SDI premises. Accordingly, the Kaplans were not read the *Miranda* warnings. The agents did not have their guns drawn, although Robert Kaplan testified that he observed that Agent Bomstad was armed. It is not clear from Agent Bomstad's testimony whether she or another agent specifically told Robert Kaplan or Todd Kaplan that they had a right not to consent. However, both individuals signed written consents to search which indicated they gave voluntary and knowing consents to search the offsite storage facility. Based on the totality of the circumstances, the Court therefore finds that the consents to search executed by Robert Kaplan and Todd Kaplan were voluntary. The Government was, therefore, authorized to search the offsite storage facility and to seize records within those categories set forth in Attachment "B" to the search warrant which the Court has found were described with sufficient particularity.

CONCLUSION

The Court therefore finds the search warrant in this case was partially invalid under the Fourth Amendment because it failed to describe the documents or records to be seized with sufficient particularity in the following categories:

2. Documents relating to billing procedures, billing manuals, and billing materials.

4. Documents relating to billing records and records of payments received.

7. Documents relating to non-privileged correspondence with consultants.

8. Documents relating to correspondence with Medicare intermediaries and private insurance companies.

9. Documents relating to non-privileged internal memoranda and E-mail.

10. Documents relating to bank accounts, brokerage accounts, trusts.

11. Checking, savings, and money market account records, including check registers, cancelled checks, monthly statements, wire transfers, and cashier checks.

12. Documents relating to personnel and payroll records.

13. Documents relating to accounting records.

19. Documents relating to mailing and shipping records between physicians and SDI.

24. Rolodexes, address books and calendars.

The Court finds that Defendants SDI, Todd Kaplan and Jack Brunk have standing to challenge the seizure of documents within these overbroad and invalid categories. The Court further finds that the seizure of documents in these categories cannot be upheld under the incorporation by affidavit doctrine, the "permeated-with-fraud" exception, or the good faith exception to the Fourth Amendment. The Court therefore finds that the Government's seizure of documents in the foregoing categories should be suppressed. The Court also finds that Defendant Todd Kaplan's and Robert Kaplan's consents to search the offsite storage facility, although voluntary, were tainted to the extent that the search warrant was invalid. Therefore, seizure of documents in the foregoing categories from the offsite storage facility should also be suppressed.

The Court finds that the remaining of categories of documents in the search warrant, items 1, 3, 5, 6, 14, 15, 16, 17, 18, 20, 21, 22 and 23, were described with sufficient particularity and that under the doctrine of severance, the seizure of documents in those categories was proper and should not be suppressed, notwithstanding the invalidity of other portions of the warrant.

Defendants argued in their Motion (#41), page 8, that based on the records illegally seized from SDI, the Government was able to subpoena records from insurance companies and physicians which should also be suppressed as "fruits of the poisonous tree." Because the Court, here, has recommended only partial suppression of the records seized by the Government, it cannot be determined on this record whether the evidence obtained by the Government through subsequent subpoenas were the fruits of the illegally obtained evidence. If the District Court approves and adopts these Findings and Recommendations, further proceedings may be required to determine whether evidence subsequently obtained by the Government through subpoenas should also be suppressed.

RECOMMENDATION

IT IS RECOMMENDED that Defendants' Motion to Suppress (#41) be **GRANTED**, in part, and **DENIED**, in part, in accordance with the foregoing Findings.

NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst,* 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 26th day of June, 2006.

GEORGE FOLEY, JR.
UNITED STATES MAGISTRATE JUDGE